IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 154

RONALD JAMES, ET AL.,

Appellants,

—v.—

ANITA VALTIERRA, ET AL.,

Appellees.

No. 226

VIRGINIA C. SHAFFER,

Appellant,

—v.—

ANITA VALTIERRA, ET AL.,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF APPELLEES ANITA VALTIERRA, ET AL.

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OPINION BELOW

The opinion of the three-judge district court is reported at 313 F. Supp. 1, and appears in the Appendix [hereafter cited A. ....] at A. 168-177. Its judgment appears at A. 178-179.

JURISDICTION

The jurisdiction of the district court was sustained by 28 U.S.C. § 1343(3), (4), since plaintiffs-appellees charged that Article 34* of the California Constitution deprived them of rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment. *See* Rev. Stat. § 1979, 42 U.S.C. § 1983. Because they requested an injunction against the

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*For ease in reading, we use arabic rather than roman numerals to designate frequently cited Articles of the California Constitution.

enforcement of that Article of the ground of its inconsistency with the Fourteenth Amendment, a three-judge district court was required by 28 U.S.C. § 2281. *A.F.L. v. Watson*, 327 U.S. 582 (1946). The jurisdiction of this Court on direct appeal from the final judgment granting the injunction rests upon 28 U.S.C. § 1253. *Shapiro v. Thompson*, 394 U.S. 618 (1969).[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. The case involves Article 34 of the Constitution of the State of California, which reads as follows:

> Article XXXIV of the Constitution of California
>
> § 1. Approval of electors; definitions
>
> Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.
>
> For the purposes of this article the term 'low-rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the

1. Plaintiffs-appellees prevailed below on their Equal Protection claim. They also urge, as an alternative ground for affirmance, that Article 34 violates the Supremacy Clause, Art. VI, cl. 2, of the Constitution of the United States, and the United States Housing Act of 1937, 42 U.S.C. §§ 1401 *et seq.* This claim was made below (A. 12,93); the district court's jurisdiction to entertain it was pendent to its jurisdiction of the Equal Protection claim, *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); and, by reason of the inclusion of the Equal Protection claim in the complaints, a three-judge court was required to hear it. *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73 (1960).

Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term 'low-rent housing project, any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

For the purposes of this article the term 'state public body' shall mean this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State.

For the purposes of this article the term 'Federal Government' shall mean the United States of America, or any agency or instrumentality, corporate or otherwise, of the United States of America. (Added Nov. 7, 1950.)

§ 2. Self-executing provisions

Sec. 2. The provisions of this article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation. (Added Nov. 7, 1950.)

§ 3. Partial validity

Sec. 3. If any portion, section or clause of this article, or the application thereof to any person or circumstance, shall for any reason be declared unconstitutional or held invalid, the remainder of this article, or the application of such portion, section or clause to other persons or circumstances, shall not be affected thereby .(Added Nov. 7, 1950.)

§ 4. Conflicting provisions superseded

Sec. 4. The provisions of this article shall supersede all provisions of this Constitition and laws enacted thereunder in conflict therewith. (Added Nov. 7, 1950.)

B. The case involves the sections of the United States Housing of Act 1937 that are codified as 42 U.S.C. §§ 1401, 1410(h), 1415(7), and the sections of the California Housing Authorities Law that are codified as Cal. Health and Safety Code §§ 34200, 34201, 34240, 34313, 34353. These sections are set out in the Appendix to this Brief, pp. 1-6 *infra*.

C. The case also involves the Equal Protection Clause of the Fourteenth Amendment, and the Supremacy Clause, Art. VI, cl. 2, of the Constitution of the United States.

QUESTIONS PRESENTED

Article 34 of the California Constitution requires approval by local referendum as the precondition of each specific project for the construction of federally funded public housing for persons of low income. By the express terms of Article 34, only *low-income* housing is subject to this requirement—a requirement which is substantially more onerous than the legislative or administrative processes by which all other similar decisions are made under California law.

I. Does Article 34 violate the Equal Protection Clause of the Fourteenth Amendment, either by denying ordinary lawmaking process to the poor or by authorizing and encouraging racial discrimination in access to federal benefits?

II: Does Article 34 violate the Supremacy Clause by imposing conditions upon the administration of federal housing programs that are inconsistent with the procedures specified by the United States Housing Act of 1937 and frustrate the purposes of that Act?

STATEMENT OF THE CASE

A. Nature of the Case

Article 34 of the California Constitution prohibits the development or construction of federally funded public housing for persons of low income unless affirmative approval is obtained for each specific housing project by local popular referendum. The three-judge district court below unanimously held this referendum requirement unconstitutional as an invidious discrimination against the poor and racial minorities, in violation of the Equal Protection Clause of the Fourteenth Amendment.

Appellees (plaintiffs below) are poor persons who have been declared eligible and placed on the waiting lists for public housing in two adjoining California counties.[2] If public housing were available for them, they could secure decent, safe and sanitary housing at considerably lower rentals than they now pay to live in rank, infested, dangerous and overcrowded hovels. The United States Housing Act of 1937 provides a means for the construction of decent, safe and sanitary low-rent public housing entirely through the use of federal funds. But no such low-income public housing has been constructed in either county during the past twenty years.[3] Public housing projects proposed by their respective local Housing Authorities have been defeated at the referendum elections required by Article 34. Shackled by the referendum requirement, the local Housing Authorities are

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2. The statement in the text describes 39 of the 41 named appellees, that is, six of seven families. The seventh family was awaiting an interview to determine eligibility at the time the suit was filed. *See* p. 22 *infra*.

3. There are 50 non-federal units of housing for the elderly in Half Moon Bay, San Mateo County. *See* p. 24 n. 18 *infra*. (And although the following fact is not reflected in the record, we have lately learned—we feel obliged to mention—that there *are* 40 federally funded low-rent units in San Mateo County. These were constructed by the Housing Authority of South San Francisco in 1941, prior to the advent of Article 34.)

unable to proceed with any planning for the construction of low-income public housing despite the recognized and urgent need. Thousands of poor families continue to fill the waiting lists for non-existent public housing while they live under intolerable conditions that the Housing Act of 1937 was designed to remedy.

Faced with this stalemate, appellees instituted the present class actions in the United States District Court for the Northern District of California, seeking declarations of the unconstitutionality of Article 34 and injunctions restraining its enforcement. Two suits were filed, one affecting the City of San Jose in Santa Clara County, the other affecting neighboring San Mateo County. The district court, consolidating the suits for all purposes, gave judgment for appellees. Defendants-appellants James et al., members of the City Council of San Jose, appealed to this Court. (No. 154.) One San Jose City Councilwoman, Virginia Shaffer, took a separate appeal from the same judgment. (No. 226.)[4]

B. Legal Background

1. THE UNITED STATES HOUSING ACT OF 1937 AND ITS IMPLEMENTATION IN THE STATE OF CALIFORNIA

By the United States Housing Act of 1937 (42 U.S.C. §§ 1401 *et seq.*), Congress provided a means to furnish decent, safe and sanitary housing for persons otherwise too poor to afford it:

> It is hereby declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Chapter, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute

4. The defendants sued in the companion San Mateo case have not appealed from the district court's judgment.

shortage of decent, safe, and sanitary dwellings for families of low income, in urban, rural, nonfarm, and Indian areas, that are injurious to the health, safety, and morals of the citizens of the Nation. (42 U.S.C. § 1401.)

Recognizing that economic factors affecting home building had operated, and would continue to operate, to prevent private construction of an adequate supply of housing to meet the needs of low-income persons,[5] the Housing Act authorized the use of federal funds for the construction of public housing projects (42 U.S.C. § 1409 - § 1411).[6] Pursuant to these sec-

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5. *See* 42 U.S.C. §1415(7)(a)(ii). The legislative history of the Act indicates Congress was aware that private enterprise could not construct safe and sanitary housing at low enough cost to enable it to rent or sell such housing to the families of low income who would be served by the housing financed by this bill. H. Rep. No. 1545, of the House Comm. on Banking and Currency, 75th Cong., 1st Sess., on the United States Housing Act of 1937 (August 13, 1937), 1.

6. Apart from direct construction provided for by these sections, a 1965 amendment to the Act provided for a "supplementary form of low-rent housing which will aid in assuring a decent place to live for every citizen and promote efficiency and economy in the program under this chapter by taking full advantage of vacancies or potential vacancies in the private housing market," in areas where such vacancies do exist, by a leased-housing program (42 U.S.C. § 1421b(a)(1)). Under the leased-housing program, the local Housing Authority leases privately owned dwelling units from lessors who are willing to enter into such leases at rental levels not in excess of a maximum figure prescribed by federal law; the Authority subleases the dwellings to eligible low-income persons, who pay the Authority lesser rental amounts also fixed by federal law. (*See* the 1969 amendment to the Act which provides that rent shall not exceed one-fourth of the family's income (42 U.S.C. § 1402(1)); the difference between the rent paid by the tenant to the Authority and the rent paid by the Authority to the landlord is supplied by federal funds (42 U.S.C. §§1421b(e)); *See,* Low-Rent Housing, Leased Housing Handbook, A HUD HANDBOOK (RHA 7430.1, Nov. 1969), Chap. 2, § 1.3(a). At pp. 58-59 *infra,* we will discuss the impact of this program on the housing need.

In addition to the low-rent programs of the Housing Act of 1937 as amended, Congress has enacted various housing measures. In § 236 of the Housing and Urban Development Act of 1968, the federal gov-

tions, local Housing Authorities may develop public housing for the poor entirely by the use of federal monies. The Department of Housing and Urban Development is empowered to make preliminary loans to local public housing agencies to assist in the planning of low-rent projects (42 U.S.C. § 1415(7)(a)); loans to assist in the development, acquisition, and administration of low-rent housing projects (42 U.S.C. § 1409); annual contributions to assist in achieving and maintaining the low-rent character of the housing projects (42 U.S.C. § 1410); and, in special circumstances, capital grants (42 U.S.C. § 1411).

In order to implement the federal Act, California enacted the Housing Authorities Law (Health and Safety Code

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ernment provides for interest reduction payments on mortgages for nonprofit or limited-profit sponsors which build moderate-low income projects (12 U.S.C. § 1715z-1); *Hearings on Proposed Housing Legislation for 1968, Before Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. (1968), pt. 1, p. 32. This is principally a program for moderate-income persons, since rent supplement payments (necessary for low-income renters) are authorized for not more than 20% of the units (12 U.S.C. § 1701s(h)(1)(D)); HUD *Circular, Utilization of Rent Supplement and Public Housing Leasing Assistance in Moderate Income Programs*, FHA § 4400.18 (Nov. 18, 1968). The amendment of the Housing and Urban Development Act of 1969, Sec. 112, providing for an increase to 40% of the units "if the Secretary determines that such an increase is necessary and desirable," has not yet been put into effect. (HUD *Circular, Housing and Urban Development Act of 1969* (FHA § 4400.31, Jan. 5, 1970), § 3(c).)

Section 236 of the 1968 Act was intended to replace § 221d(3) of the 1961 Act, 12 U.S.C. § 1715l(d)(3), which had similar, but not as favorable provisions for housing sponsors. *Hearings on Proposed Housing Legislation for 1968, Before Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 2nd Sess. (1968), pt. 1 at 9, 72-73 (1968). The 1968 Act also added § 235, in order to assist lower-income (moderate-low income) families in acquiring homeownership. (12 U.S.C. § 1715z.) There are fixed maximum mortgage limitations (maximum home value limitations) mandated by the Act, and other restrictive provisions. *See generally*, Homeownership for Lower Income Families (Section 235), A HUD HANDBOOK (FHA § 4441.1, Oct. 1968). For further discussion of these programs, *See* pp. 60-62 *infra*.

§§34200 *et seq.*). That law included specific legislative findings that insanitary and unsafe dwelling accommodations exist in places within the State where persons of low income are found to reside; that there is a shortage of safe and sanitary dwelling accommodations available at rents which low-income people can afford; and that such conditions constitute a menace to the health, safety, morals and welfare of the residents of the State (Health and Safety Code §34201). The statute provides that a public corporate body, to be known as the Housing Authority, is formed in each county and city (Health and Safety Code § 34240). That Authority cannot transact business or exercise powers unless the governing body of the county or city declares that there is a need for an Authority (Health and Safety Code §34240). On March 18, 1941, by Resolution No. 468, the Board of Supervisors of San Mateo County unanimously declared the need for a Housing Authority pursuant to the Housing Authority Law (A. 111-113). On January 17, 1966, by Resolution No. 28614, the City Council of the City of San Jose declared the need for a Housing Authority pursuant to the Housing Authorities Law, with Councilwoman Shaffer alone not voting. (A. 46-47).[7] Both resolutions expressly declare that "insanitary and unsafe inhabited dwelling accommdations exist" in the respective areas and that "there is a shortage of safe and sanitary dwelling accommodations . . . available to persons of low income at rentals they can afford" (A. 46, 111).

Once need is established and a Housing Authority has been activated, a professional staff is hired to develop plans

7. Mrs. Shaffer dissented from the subsequent resolution of the City Council appointing the Housing Authority Commissioners (A. 25-27), and thereafter from the resolution by which, in 1968, the City Council placed a proposed low-income housing project on the ballot for referendum pursuant to Article 34 (A. 28-29).

for participation in leasing and construction programs. For new construction, the Housing Authority initiates an application for a preliminary loan from the federal Department of Housing and Urban Development (H.U.D.). This loan is designed to pay for an option on a site, surveys, preparation of project plans, and other developmental expenses. In recognition of the need for local determination even at this early stage, the Federal Housing Act requires as a prerequisite to action by H.U.D. that the local governing body of the city or county approve by resolution the application for a preliminary loan (42 U.S.C. § 1415(7)(a)(i)). Moreover, the loan will not be approved by H.U.D. unless the local housing authority demonstrates that there is a need for such low-rent housing which is not being met by private enterprise (42 U.S.C. § 1415(7)(a)(ii)). Further contracts for loans or annual contributions will be approved by H.U.D. only after the local housing authority has entered into an agreement with the governing body of the locality providing for local cooperation (42 U.S.C. §1415 (7)(b)(i)). H.U.D. regulations require the cooperation agreement to be executed as a prerequisite to the Preliminary Loan Contract. (Low-Rent Housing, Applications and Preliminary Loan Handbook, A HUD HANDBOOK, (RHA 7402.1, June, 1969) Chap. 1, § 3.) The California Housing Authorities Law provides, for its part, that no low-rent housing project shall be developed or constructed without prior consultation with the local school district and approval by the local governing body by resolution (Health and Safety Code §34313).

When a project has been completely planned and approved, the local Housing Authority issues federally guaranteed tax-free revenue bonds for sale to the public, and enters into an Annual Contributions Contract with the Federal

Government. "The bonds and other obligations of an authority are not a debt of the city, county, State, or any of its political subdivisions and neither are they liable on the bonds, nor are the bonds or obligations payable out of any funds or properties other than those of the authority; and the bonds shall so state on their face. The bonds do not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation." (Health and Safety Code, § 34353.) All costs for construction of the project are financed and paid for by proceeds from the bonds. The cost of repaying principal and interest to the purchasers of the bonds is totally financed and paid for by the Federal Government pursuant to its Annual Contributions Contract. (Low-Rent Housing, Financing Handbook, A HUD HANDBOOK (RHA 7560.1, June, 1969), Chap. 1, § 6b, Chap. 4, § 1b.) No local funds are used and no obligation of debt is imposed on the local government.

The federal Act also provides that the local government shall exempt the housing project from property tax. In lieu of property taxes, the local government receives 10% of the annual shelter rents in the project (42 U.S.C. § 1410(h)). The difference between 10% of shelter rents and the amount of taxes (possibly higher) which might be levied if the project were privately owned property is considered by the Federal Government to be a reasonable and necessary contribution by the local government. The local tax assessment scale, land value and use in the area, prior development and tax paid on the land where the low-income housing project is built, and the value of the project itself, would of course determine the exact measure of the local government's contribution, if any. Whatever that measure, the housing project does pay 10% of its rents as property tax,

and does not benefit from the total property tax exemption enjoyed by a variety of other land uses.[8]

2. ARTICLE 34 OF THE CALIFORNIA CONSTITUTION.

Under federal and state law, experts from the local governing body, the local Housing Authority and the federal government must independently consider the project plans and determine not only that the project is needed and wanted, but also that it is well planned, feasible as to cost and size, and complies with myriad technical requirements. *See* 42 U.S.C. §§1415(7)(a)(i), 1415(7)(a)(ii), 1415(7)(b)(i); Health and Safety Code § 34313; Low-Rent Housing, Preconstruction Handbook, A HUD HANDBOOK (RHA § 7410.1, June, 1969) Ch. 4, § 2. As indicated above, before a federally funded low-income public housing project can be constructed, four successive and distinct determinations must be made by the local governing body: to create a Housing Authority (Health and Safety Code, §34240); to apply for a preliminary loan to finance the planning of the project (42 U.S.C. § 1415(7)(a)(i)); to agree with the local Housing Authority to provide the requisite local cooperation (42 U.S.C. § 1415(7)(b)(i)); and to proceed with construction of the planned project (Health and Safety Code § 34313).

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8. *See e.g.*, property belonging to the State, county, city or municipal corporation. (Cal.Const., Art. XIII, §1, Cal. Rev. & Tax Code, §202); parks, playgrounds, courthouses, and other property devoted to government use. (Cal. Rev. & Tax Code, §231); church property, (Cal.Const., Art. XIII, § 1-½, Cal. Rev. & Tax Code, § 206, 206.1); colleges and public schools, (Cal.Const., Art. XIII, § 1(a), Cal. Rev. & Tax Code §§ 202, 203); public libraries and museums, (Cal. Const., Art. XIII, § 1, Cal. Rev. & Tax Code, § 202); hospitals, (Cal.Const., Art. XIII, § 1(c); Cal. Rev. & Tax Code, §§ 214, 231; cemeteries, (Cal.Const., Art. XIII, § 1B; Cal. Rev. & Tax Code, § 204); property used exclusively for religious, hospital, scientific, or charitable purposes, (Cal. Rev. & Tax Code, § 214); fruit and nut-bearing trees under four years and grapevines under three years (Cal. Const., Art. XIII, §12¾s, Cal. Rev. & Tax Code, § 211).

Article 34 of the California Constitution, added by initiative referendum in 1950, engrafts upon these procedures an additional requirement: that development or construction of each specific project be affirmatively authorized by local popular referendum. Article 34 provides in relevant part:

> Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.
>
> For the purposes of this article the term "low-rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. . . .
>
> For the purposes of this article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

Under California law, the Secretary of State is required to distribute, prior to elections at which initiative mea-

sures are submitted to the voters, an explanatory pamphlet containing, *inter alia,* arguments for and against each measure. In this pamphlet the proponents of Article 34 (then Proposition 10) advocated its adoption for the following reasons:

ARGUMENT IN FAVOR OF INITIATIVE PROPOSITION NO. 10 [Article 34]

A "yes" vote for this proposed constitutional amendment is a vote neither for nor against public housing. It is a vote for the future right to say "yes" or "no" when the community considers a public housing project.

Passage of the "Public Housing Projects Law" will restore to the citizens of a city, town, or county, as the case may be, the right to decide whether public housing is needed or wanted in each particular locality. Such is not the case at present.

Time after time within the past year, California communities have had public housing projects forced upon them without regard either to the wishes of the citizens or community needs. This is a particularly critical matter in view of the fact that the long-term, multimillion-dollar public housing contracts call for tax waivers and other forms of local assistance, which the Federal Government says will amount to half the cost of the federal subsidy on the project as long as it exists.

For government to coerce such additional hidden expense on the voters at a time when taxation and the cost of living have reached an extreme high is a "gift" of debatable value. It should be accepted or rejected by ballot.

If, on the other hand, certain communities are in such dire need of housing that the cost of long-term subsidization is deemed worthwhile, local voters, who best know that need, should have the right to express their wishes by ballot.

In either case, a "yes" vote for this proposed amendment will strengthen local self-government and restore to the community the right to determine its own future course.

Furthermore, the financing of public housing projects is an adaptation of the principle of the issuance of revenue bonds. Under California law, revenue bonds, which bind a community to many years of debt, cannot be issued without local approval given by ballot. Public housing and its long years of hidden debt should also be submitted to the voters to give them the right to decide whether the need for public housing is worth the cost.

A "yes" vote for the "Public Housing Projects Law" is a vote for strong local self-government. It is an expression of confidence in the community's future and in the democratic process of government. To strengthen the grass roots democracy which has made America protector of the world's free peoples, vote "yes" on the Public Housing Projects Law. (A. 50-52.)[9]

Those opposed to Article 34 argued, in part, that Article 34 was unnecessary since local approval was already provided for in the Housing Authorities Law; that Article 34 was contrary to firmly established principles of American

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9. On November 3, 1950, immediately prior to the election, the *Los Angeles Times*, the state's most widely circulated newspaper, offered the following editorial explanation of the measure (vol. LXIX, Nov. 3, 1950, pt. II, p. 4; R 250):

> ... What has happened in the field of public housing is that control has gotten completely out of the hands of the citizen. Suppose—and this has happened many times—you read in this morning's paper that a new government housing project for low-income families is going to be built across the street from you. You know this will change all the years of planning and building you have done on your home, and ruin the market value of your property...

representative government; that elections are time-consuming and very expensive; and that Article 34's true purpose was to discourage the construction of low-rent housing projects (A. 52-54).

C. Proceedings Below

The cases designated No. 154 and No. 226 in this Court are two appeals from the single judgment entered by the court below (A. 178-179). That judgment was entered in two companion suits which were filed separately but were subsequently "consolidated for all purposes" (A. 178) by the district court. Because the two appeals in this Court do *not* correspond to the two actions in the court below, and because the array of parties and their respective positions throughout this litigation are somewhat complicated, it may be helpful to identify the parties and describe the proceedings below systematically.

1. On August 27, 1969, a complaint was filed in the district court, styled *Anita Valtierra, et al. v. Housing Authority of the City of San Jose, et al.* (A.1). The individual plaintiffs were members of three impoverished families who had been found eligible and placed on the waiting list for public housing in the City of San Jose, Santa Clara County, California (A. 14-20). (The City of San Jose has established its own Housing Authority (A. 46-47, 25-27) which administers public housing programs within the city and is independent of the Housing Authority of Santa Clara County (*See* A. 31-33).)

2. The plaintiffs in *Valtierra* sued on their own behalf, and also as representatives of all poor persons on the waiting list of the Housing Authority of the City of San Jose (A. 5). Admissions filed by the Housing Authority on November 18, 1969, establish that there were 779 families on the waiting list as of that date (A. 56).

3. Defendants in *Valtierra* were the Housing Authority of the City of San Jose and its members, the City Council of San Jose and its members, the Mayor of San Jose, the United States Department of Housing and Urban Development (H.U.D.), and its Secretary, George Romney (A.1, 5-6.). The district court dismissed H.U.D. and Secretary Romney on the ground that "their joinder is not necessary in order to grant the relief . . . requested" in the action (A. 171). Separate answers to the complaint were filed (1) by the Housing Authority and its members (A. 39-40), and (2) by the City Council and its members (who include the Mayor of San Jose and Councilwoman Virginia Shaffer, among others) (A. 63-66). In response to requests for admissions filed by the plaintiffs (A. 41-45), separate sets of admissions were subsequently filed (1) by the Housing Authority and its members (A. 55-56); (2) by the City Council and its members other than Virginia Shaffer (A. 57), and (3) by Virginia Shaffer (A. 58). With the exception of this one separately filed document, Virginia Shaffer asserted no individual position independent of her municipal co-defendants throughout the proceedings in the district court. She was notified of those proceedings and represented therein by the City Attorney of San Jose, together with the other municpal defendants.

4. On October 1, 1969, a second complaint was filed in the district court, styled *Gussie Hayes et al. v. Housing Authority of San Mateo County et al.* (A. 79). The individual plaintiffs in this *Hayes* action were members of four impoverished families residing in San Mateo County[10] who were eligible for public housing. Three had been found eligible by the Housing Authority of San Mateo County and were on the waiting list (A. 104-109). The fourth was

10. San Mateo County borders Santa Clara County to the North.

still awaiting an interview to determine eligibility, because the press of numbers was such that interviews were backlogged three to five months (A. 110, 124).

5. The plaintiffs in *Hayes* sued on their own behalf and as representatives of all poor persons eligible for public housing in San Mateo County (A. 85). An affidavit of the Executive Director of the Housing Authority of the County established that, at the time of filing of the action, there were more than 2000 families who had been found eligible and placed on the waiting list for public housing, while scheduled interviews for additional eligibility determinations were running at least three months behind (A. 123-124).

6. Defendants in *Hayes* were the Housing Authority of San Mateo County and its members (A. 79, 85-86). They declined "to appear formally in [the] . . . action," noting that "[b]y virture of the fact that this action has been consolidated with *Valtierra* . . . , the question as to the constitutionality of Article XXXIV of the Constitution of the State of California will undoubtedly be resolved."[11]

7. In *Valtierra,* the plaintiffs requested a preliminary injunction on August 27, 1969, upon the affidavits filed with their complaint (R. 29-30; *See* A. 73, 165), and the defendants filed motions to dismiss on September 23, 1969 and November 12, 1969 (A. 73, 74). In *Hayes,* the plaintiffs moved for summary judgment upon numerous affidavits on November 6 (A. 164; R. 282). The cases were consolidated for hearing by a statutory three-judge court on November 20 (A. 163, 75, 165, 170). Pursuant to 28 U.S.C. §2284(2), the Governor and the Attorney General of the State of California were notified of the hearing, both by the court and by the parties. No appearance was made for the State.

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11. These positions were stated in a letter to the court from counsel for the Housing Authority (A. 160-161).

8. At the hearing on November 20, the consolidated cases were fully argued upon all issues presented. The plaintiffs in *Valtierra* indicated their intention to file a motion for summary judgment, in order to place the *Valtierra* action in the same procedural posture as the *Hayes* action. (That motion was in fact filed on November 25 (A. 68-69, 75).) The defendants were given until December 1 to file any affidavits they might wish to submit in response (A. 75, 165-66). They filed none, but did enter into a stipulation of fact that was filed on November 28 (A. 69-70, 75). Thereafter, pursuant to its orders of November 20, the court proceeded to consider the several pending motions upon the complaints (A. 1-13, 79-96), answers (A. 39-40, 63-66), affidavits (A. 14-24, 31-33, 59-62, 67-68, 104-110, 122-159), stipulation (A. 69-70), admissions (A. 55-58), and documents (A. 25-30, 34-38, 46-54, 75 (docket entry #29), 97-103, 111-121) of record.

9. On March 23, the court rendered its unanimous opinion (A. 168-177), in the consolidated cases (A. 163, 170, 178), denying the defendants' motions to dismiss (A. 172) and granting plaintiffs' motions for summary judgment (A. 177-179) upon findings that "there is no genuine issue of material fact" (A. 178) and that "plaintiffs in both causes are entitled to summary judgment as a matter of law" *(Ibid.)*. The court found "plaintiffs' Supremacy Clause argument to be unpersuasive and therefore [did] . . . not decide the case on that ground" (A. 172). It concluded that Article 34 violated the Equal Protection Clause of the Fourteenth Amendment because it denied poor persons and racial minority groups the ordinary processes of law (A. 173-175), and made it "more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive financial federal

assistance" (A. 176). This discrimination resulted from the express limitation of the referendum requirement of Article 34 to housing for " 'low-income persons' " (A. 173), a group whom the court found to be comprised largely of racial minorities (A. 176). The court therefore declared Article 34 unconstitutional (A. 169, 177, 178) and enjoined its enforcement (A. 177, 178-179) "as a reason for not requesting state or federal assistance with which to finance low income housing" (A. 179; *see* A. 172). This decree, as the court made clear, did not compel any Housing Authority or local governing body to seek federal funding for public housing; it did not delimit in any way the discretion of Housing Authorities or local governing bodies to choose to have or not to have public housing in any form (A. 172). The only effect of the decree was to strike down Article 34's discriminatory requirement of affirmative approval by local popular referendum as a precondition of development of federally funded housing for low-income persons.

10. On April 2, 1970, the San Jose City Council defendants' motion to stay execution of the court's judgment was denied, and the final judgment was entered (A. 76).

11. The Mayor and the other members of the City Council of San Jose, excepting Councilwoman Virginia C. Shaffer, appealed to this Court and appear here as the appellants in No. 154, *Ronald James, et. al. v. Anita Valtierra, et al.* San Jose City Councilwoman Virginia C. Shaffer filed a separate jurisdictional statement, and appears as the appellant in No. 226, *Virginia C. Shaffer v. Anita Valtierra, et al.* Appellees in Nos. 154 and 226 are the individual and class plaintiffs in both the *Valtierra* and *Hayes* cases.

12. The Housing Authority of San Mateo County and its members have not appealed and do not appear in this

Court. The Housing Authority of the City of San Jose and its members have not appealed; we are advised, moreover, that they intend to file a brief herein in support of the judgment below.

Before concluding this description of the parties and the proceedings below, it seems appropriate to dispel several misimpressions created by the brief filed on behalf of appellant Shaffer. *First,* contrary to footnote 10a on p. 13 of that brief, *both* the *Valtierra* and *Hayes* records are properly before this Court on the appeals.[12] The two cases were expressly "consolidated for all purposes" by order of the district court (A. 178; *see also,* A. 163, docket entry October 10, and the court's opinion at A. 170). It is apparent, moreover, that all of the district court plaintiffs have the same direct interest in the outcome of the appeal. *Second,* the impression conveyed by the *Shaffer* brief that appellant Shaffer has somehow not had a full chance to tell her story below—an effort apparently designed to excuse her inclusion in her brief of materials outside the record and not judicially noticeable—is entirely unwarranted. Mrs. Shaffer appeared below, she was represented below, and she had every opportunity, as did all of the defendants, to submit materials for the record on summary judgment. That she "retained new counsel after appeal" (*Shaffer Brief,* p. 17) is hardly a justification for her trying the case *de novo* in this Court. *Third,* appellant Shaffer's assertion that this is "a feigned case" (*id.,* at p. 16) in which her fellow defendants of the San Jose City Council "put up indifferent opposition [below] and appealed in order to obtain this Court's approval of the judgment, not

12. The brief also errs in stating *(ibid)* that "Appellees have caused to be reproduced in the Appendix the record of *Hayes* . . ." The *Hayes* record was reproduced by the appellants—properly so, since the cases were consolidated for all purposes.

reversal" (Id., p. 17) is also factually baseless. The record below was made in adversary fashion and is subject neither to vague aspersions of connivance nor to reconstruction by appellate briefing.[13]

D. Facts Relevant to the Constitutional Questions

The individual appellees are 41 persons of low income—seven families of mothers and children—eligible for public housing. Six of these families have been determinded to be eligible and have been placed on the waiting lists of their respective local Housing Authorities, where they have remained for periods ranging from three months to two years and nine months (A. 14, 17, 19, 104, 106, 108). The seventh family was undergoing a five-month wait for an interview to determine eligibility at the time the suit was filed (A. 110). Appellees have not been placed in decent, safe and sanitary low-rent units because no units are available. As a result, they now live in overcrowded, run-down, rat-infested, roach-infested dwellings.

In San Jose, Anita Valtierra lives with her seven minor children in a one-bedroom apartment (A. 14). Similar overcrowding is the forced way of life for all of the appellees (A. 17, 19, 104, 106, 108, 110). Mrs. Valtierra has been unable to find a larger home for her family which she can afford (A. 15); this too is a common problem (A. 17, 19, 105, 106-107).[14]

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13. *The Shaffer* brief also asserts (p. 27), "*Self-evidently, plaintiffs are not even the moving force in the suit; their names have been conscripted by counsel interested in obtaining an advisory opinion serviceable to their social views.*" (Emphasis in original.) The charge is both gratuitous and false. The plaintiffs in question were not "conscripted." They were not "mere names." They are forty-one vitally affected women and children who have been living in conditions of squalor and have the determination to seek escape from that condition by any means lawfully within their power.

14. *See, Draft, The Housing Situation: 1969* (The County of

In San Mateo County, Gussie Hayes lives with five of her minor children in a house which is infested with mice and cockroaches (A. 104). The sewerline in the backyard is broken, and there is a backup of sewage in the toilet and bathtub. The children cannot use the toilet, or take baths, and must go to a relative's home for these facilities (A. 104). Substandard housing of this sort (A. 97-103) is all that appellees and other similarly situated persons can afford (A. 17, 19, 60, 67-68, 108, 110).[15] Yet, for such housing, appellees are required to pay rents which are exorbitant in light of their income, with the result that they are deprived of other necessaries such as clothing (A.. 20, 105, 107). Mrs. Hayes has placed one of her children with her sister because of the demeaning conditions in her home (A. 104). Because of the unavailability of decent, low-cost housing, the breaking up of families is not uncommon (A. 14, 19, 107, 129-30).

More than 2,779 families in San Mateo County and in the City of San Jose are in basically the same situation as the named appellees and share the waiting list for low-rent housing.[16] The waiting lists would probably be longer if it were not for the excessively long delay in obtaining a determination of eligibility (A. 110, 124) and the hopelessness of

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Santa Clara, November 4, 1969), plaintiffs' exhibit, unnumbered in the record (*See* A. 75, docket entry no. 29) [hereafter cited as *Draft, The Housing Situation: 1969*], at pp. 26-27. This document was filed in draft form because the final study was not completed until after the cases were submitted.

15. *See, Draft, The Housing Situation: 1969*, p. 35.

16. At the time the complaints were filed there were over 2,000 families on the waiting list of the San Mateo County Housing Authority (A. 123-124), and 779 eligible families on the waiting list of the Housing Authority of the City of San Jose (A. 56). *See* A. 21 and A. 23, which show that the City of Fresno Housing Authority has 1,000 families on the waiting list, and the Housing Authority of Sacramento, 2,862 families, respectively.

going through the process of an interview for eligibility when it is widely known that no housing is available.[17]

Both the San Mateo County Housing Authority and the Housing Authority of the City of San Jose have taken advantage of the leased housing program that is federally financed under the Housing Act of 1937, but the program has been unsuccessful in alleviating the tremendous shortage of housing available for persons of low income (A. 123-4, 61). The leased housing program has proved similarly inadequate elsewhere in California (A. 21-22, 23-24, 31). It is widely agreed that direct construction of low-rent housing is indispensable if acute needs are to be met (A. 22, 24, 31-33, 122-24).

The roadblock to obtaining this desperately needed housing for the poor is Article 34 of the California Constitution which requires voter approval for federally financed low-income housing projects (A. 21, 23, 31-33, 122-124, 126, 128, 130, 133, 135-36, 138, 141, 143-44, 153, 155). In 1968, a proposal for low-rent housing units submitted to the voters of the City of San Jose was defeated (A. 28-30). In 1966, two elections were held pursuant to Article 34 in the City of Pacifica, San Mateo County. Both failed (A. 114-21).[18] In the opinion of the Director of the San Mateo County Housing Authority, any low-income public housing proposal within the County would be overwhelmingly defeated at a referendum, because the predominant middle- and upper-

17. *See* Affidavit of Fergus P. Cambern, Executive Director of the Housing Authorities of the County and City of Fresno (A. 21); *Draft, The Housing Situation: 1969,* p. 42.

18. A referendum in 1951, in Half-Moon Bay, San Mateo County, for 50 units of locally funded (non-federal) Senior housing was successful. In the opinion of the Director of the Housing Authority of San Mateo County, approval of such Senior housing would be doubtful today, and public housing would be overwhelmingly defeated (A. 123).

income residents fear devaluation of their property and an influx of low-income and minority groups (A. 122). This view is shared by many residents of San Mateo and Santa Clara counties who have had long experience in the housing area (A. 126, 128, 130, 133, 135-36, 138, 141, 143-44, 153, 155).[19]

Most of the appellees are members of racial minority groups; those in San Mateo are predominantly black (A. 80-84), and those in Santa Clara are predominantly Spanish-surnamed (A. 3-5). Racial minorities are over-represented in the low-income group and in the occupation of substandard overcrowded housing.[20] This is attributable in significant measure to class and race prejudice.[21] Realtors and homeowners in the area commonly assert, "wouldn't they be happier with their own people;" "I personally have no bias, but my neighbors would object;" or "my other tenants would move out" (A. 125). Discriminatory practices in housing include "prohibitive extra costs and requirements imposed on leases if blacks wish to rent" (A. 127); also, "Blacks are continually told that apartments were just rented, even though later checks reveal that they are still available; owners don't open the door when they see that blacks are ringing the doorbell; realtors require black persons to go through long, detailed credit checks, and don't require the same for white applicants; they also claim no one is available to show an apartment, or claim the apartment keys were misplaced. The worst practice occurs when landlords ask black applicants very personal, probing questions which

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19. The view is also shared by the Housing Authority Directors in Fresno and Santa Clara counties (A. 21-22, 31-32).

20. *Draft, The Housing Situation: 1969*, pp. 49-52, 53; A. 61-62, 128, 129-30, 138, 143-44, 148, 153, 154.

21. *Draft, The Housing Situation: 1969*, pp. 73-79; A. 22, 32, 61-62, 122, 125-26, 127-28, 129-30, 131-133, 134-36, 137-38, 139-41, 142-44, 151-53, 154-55.

invariably cause the applicants to leave" (A. 137-138). (*See* A. 143.) These practices are often rationalized as a protection against economic devaluation of property (A. 127). Nonprofit sponsors of low-and moderate-income projects have been thwarted by racial prejudices (A. 139-40). This is also true of the leased housing program (A. 140, 123). One experienced observer in San Mateo County states:

> From my experience as an attorney, as a participator in negotiations for the purpose of obtaining agreements from persons in the housing industry to publicize pledges to provide open housing, upon investigation through testing and other means, and from discussions with individuals and groups in the housing industry as to the basis for refusals to rent or sell housing, I have formed the opinion that discrimination in housing in San Mateo County on the basis of race and ethnic background prevails throughout the housing industry. I have also formed the opinion that the major method by which laws against open discrimination are evaded is by making most housing in San Mateo County economically beyond the means of most members of racial minority groups. It is my opinion that a referendum within the county or any city in San Mateo County, with respect to proposed low-income housing would result in the primary issue being the admission or exclusion of members of racial minority groups (A. 133).[22]

SUMMARY OF ARGUMENT

I.

Article 34 denies poor persons the equal protection of the laws in the most rudimentary sense: by depriving them of access to the ordinary law-making processes of government for the protection of their housing interests. It re-

22. *See also* notes 20-21, *supra*.

quires the approval of a popular plebiscite to develop federally-funded public housing for "persons of low income," whereas all other similar governmental decisions under California law may be made legislatively, without the necessity of a plebiscite. This is not a "neutral" provision of law. It is an invidious discrimination, directed explicitly against the poor, which excludes them from both normal political institutions and vitally needed federal benefits. It cannot be constitutionally sustained unless shown to be supported by some compelling state interest; and the interests asserted to support it—far from being compelling—are entirely hollow.

II.

In its setting, Article 34 is simply a device for making popular resistance legally effective whenever and wherever the federal public-housing program threatens to intrude upon that most sensitive preserve of racism: residential segregation. Article 34 has no other coherent function or inevitable effect than to authorize and invite a racial veto within the administration of a governmental housing program. It is accordingly unconstitutional.

III.

The referendum requirement of Article 34 is inconsistent with the elaborate and specific procedures defined by federal law for the development of federally-funded public housing programs under the United States Housing Act of 1937. It impedes the operation of the Act and frustrates its purposes. Article 34 cannot stand consistently with the Act and the Supremacy Clause.

ARGUMENT

I

Article 34 Violates the Equal Protection Clause of the Fourteenth Amendment Because It Discriminatorily Denies Poor Persons the Use of Ordinary Law-Making Procedures

The Fourteenth Amendment forbids a State to "deny to any person within its jurisdiction the equal protection of the laws." An elementary meaning of that guarantee is that a State may not invidiously discriminate among persons or groups in access to its basic law-making and law-administering machinery, by which public protection is ordinarily given to private rights. *E.g., Williams v. Rhodes,* 393 U.S. 23 (1968). When any group is unjustifiably refused the use of legal processes that are available for the promotion and advancement of the interests of other groups—when *its* interests are required to be pursued through different and more burdensome legal channels—it is denied equal protection of the laws in the most fundamental sense. *Hunter v. Erickson,* 393 U.S. 385 (1969). The question presented here is whether Article 34 offends that principle.

We submit that it plainly does. In the following subsections, we show first that Article 34 places an extraordinary and onerous referendum requirement selectively athwart the process of decision-making to which poor persons must look for the fulfillment of their housing needs. California law requires no similar referendum in the making of any similar governmental decision. (Subsection A.) Next, we note that this selective requirement, which explicitly applies only to the poor and operates to deny them vital federal benefits, cannot survive constitutional scrutiny unless it is supported by some compelling state interest. (Subsection B.) Finally, we examine the interests that are said to support Article 34, and find them wanting. (Subsection C.)

A. THE MANDATORY REFERENDUM REQUIRED BY ARTICLE 34 TO AUTHORIZE LOW-INCOME PUBLIC HOUSING CONSTRUCTION IS DIFFERENT AND MORE BURDENSOME THAN THE PROCEDURES BY WHICH ALL SIMILAR DECISIONS ARE MADE UNDER CALIFORNIA LAW

Appellant Shaffer's Brief in No. 226 seeks to convey the impression that the referendum requirement of Article 34 is nothing more than the application to low-income public housing of a general California practice that subjects all legislative decision-making to popular referenda. (Pp. 6-7, 18, 33-34, 48-49, 54.) That impression is wrong. It rests upon a confusion of two entirely different referendum procedures under California law.

1. THE REVIEW REFERENDUM

Article 4, § 1, of the California Constitution provides that, upon petition signed by a designated percentage of the electorate,[23] any state or local legislative enactment shall be submitted to the voters for rejection or adoption. This sort of referendum, which we may call a *review referendum*, is indeed an "all-pervasive" feature of California government. (Brief for Appellant Shaffer, p. 54.) It applies to legislation upon all subjects, in favor of any and all interests, at all levels of law-making. Its effect is not to require law-making

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23. Art. 4, § 1, ¶ 7, and Art. 4, § 23 require that an enactment of the state legislature be submitted to referendum upon petition of 5% of the number of electors who cast votes for Governor at the last gubernatorial election. Art. 4, § 1, ¶18 leaves the details of referendum procedure at the county and city levels to be fixed by state and local law, which, however, "shall not require . . . more than 10 percent of the electors . . . to order the referendum." Cal. Elections Code §§ 3752-3753 require a referendum upon a county ordinance on petition by not less than 10% of the number of voters of the county who voted for Governor at the preceding gubernatorial election. The Charter of the County of San Mateo (1966), Art. 12, § 2, adopts these provisions. The Charter of the City of San Jose (1965), §1603, provides for referendum on petition of 8% of the number of electors eligible to vote in the preceding municipal election.

by popular plebiscite. It permits law-making in the first instance—and ordinarily in the last instance—by legislative action alone. If, however, a sufficient number of electors can be organized to sign a petition in opposition to a legislative enactment, then that enactment is submitted to the voters for review at the polls.

The California courts have long and consistently held—like most state courts under similar constitutional provisions[24]—that Article 4, § 1 applies only to "legislative" as distinguished from "executive" or "administrative" enactments.[25] It was pursuant to this doctrine, in 1941 and 1950, that the California Supreme Court characterized municipal decisions to proceed with particular federally-funded low-income housing projects as "administrative" and hence not subject to referendum under Article 4, § 1.[26] We need not

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24. *See* 62 C.J.S., MUNICIPAL CORPORATIONS, § 454 (1949), at 874-875.

25. *Hopping v. City Council of City of Richmond*, 170 Cal.605, 150 Pac. 977 (1915). *Compare Martin v. Smith*, 184 Cal.App.2d 571, 7 Cal.Rptr. 725 (1960), with *Reagan v. City of Sausalito*, 210 Cal. App.2d 618, 26 Cal.Rptr. 775 (1962); *and see* the discussion of the principal authorities in *Hughes v. City of Lincoln*, 232 Cal.App.2d 741, 43 Cal.Rptr. 306 (1965); Greenberg, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717, 1734-1738 (1966); Note, *Judicial Limitations on the Initiative and Referendum in California Municipalities*, 17 HASTINGS L. J. 805, 806-812 (1966).

26. *Kleiber v. City and County of San Francisco*, 18 Cal.2d 718, 117 P.2d 657 (1941); *Housing Authority of the City of Eureka v. Superior Court*, 35 Cal.2d 550, 219 P.2d 457 (1950). The *Kleiber* case involved the question whether the San Francisco Board of Supervisors could approve low-income public-housing contracts by resolution, or were required to act by ordinance. Under the applicable law, this question depended upon the characterization of the contracts as "legislative" or "administrative"; and the California Supreme Court decided that they were "administrative." Quite expectably, *Kleiber* was thought controlling nine years later when, in the *Housing Authority* case, the same question of characterization arose in connection with the application of the referendum provision of Article 4, § 1.

pursue the question whether appellants are historically correct in viewing Article 34 as an "immediate response" to the later of these two routine holdings (Brief for Appellant Shaffer, p. 7; *see* Brief for Appellants James *et al.*, pp. 13-14).[27]. For if, historically, Article 34 was a "response," it was legally an over-response, and a discriminatory one. Article 34 did not subject low-income public housing decisions to the "general democratic principle"[28] of Article 4, § 1. Instead, it imposed upon the proponents of low-income housing projects alone a different and more burdensome referendum procedure.

2. THE MANDATORY PRIOR-APPROVAL REFERENDUM

Article 34 involves a *mandatory prior-approval referendum* (hereafter called simply a mandatory referendum). Under its procedures, which apply exclusively to the development of public housing for the poor, the ordinary legislative competence of local governing bodies is denied, and they may act only as specifically authorized by popular plebiscite.

Whereas Article 4, § 1, *supra*, permits other governmental decisions to be made legislatively subject only to review and undoing by the electorate at the behest of opponents of the legislation who are able to obtain the requisite number of signatures on a referendum petition, Article 34 requires the proponents of low-income public housing to bear the double burden of obtaining local legislative approval *and* the advance approval of the voters at the polls. This burden would be heavy enough if imposed upon any group. In fact it is imposed only upon the poor, who are least able to finance a popular electoral campaign. The difference between the

27. *Compare* the materials relating to the history of Article 34 at pp. 13-16 *supra* and p. 72 *infra*.

28. Mr. Justice Harlan, concurring, in *Hunter v. Erickson*, *supra*, 393 U.S., at 394.

referendum procedure of Article 4, § 1 and that of Article 34, in short, is exactly the difference between the general referendum provision of the Akron City Charter in *Hunter v. Erickson, supra,* 393 U.S., at 390 n.6, and the special referendum requirement for open-housing legislation held unconstitutional in that case.

Other than the low-income housing decision governed by Article 34, the California Constitution requires mandatory referendum approval for only one class of governmental decision-making.[29] That is the decision of a county, city or school district to assume long-term indebtedness under a general-obligation bond. Cal. Const., Art. 13, § 40 (former Art. 11, § 18); *see Westbrook v. Mihaly,* 2 Cal.3d 765, 471 P.2d 487, 87 Cal.Rptr. 839 (1970). Former article 11, § 18 is not, as appellant Shaffer portrays it, a general command that "fiscal control be in the voters' hands" (Brief for Appellant Shaffer, p. 33). It is, to the contrary, a rather narrow and technical provision, as we shall show at pp. 48-51 *infra.* For present purposes, it is enough to note that Article 11, § 18 leaves unaffected all sorts of governmental decisions essentially identical to those involved in the development of federally-funded low-income public housing (see the immediately succeeding paragraphs); while those decisions that Article 11, § 18 does affect are unlike public-housing decisions because they involve the assumption of general bonded indebtedness by a governmental entity having taxing powers.

In summary, then under California law only two kinds of governmental decisions are constitutionally required to re-

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29. We exclude such extraordinary matters as the formation of new charter governments and territorial annexations. It is interesting to note, however, that under California law, even annexation may ordinarily occur without a mandatory referendum in the annexing territory: a referendum in the annexed territory is sufficient. Cal. Const., Art. XI, §§ 7-½b, 8-½; Cal.Gov't Code §§ 35000 *et seq.*

ceive the approval of mandatory referenda: (A) decisions to assume a limited class of public debts; and (B), pursuant to Article 34, the decision to proceed with low-income public housing, even though no public debt is assumed. All other governmental decisions are subject only to review referenda, or to none.[30] A few examples will demonstrate the discriminatory impact of Article 34 upon the local political process:

(1) All decisions affecting private or public land use, except the decision to use land for low-income public housing, may be made without mandatory referenda. Thus, for example, an interest group concerned with private development of any particular sort—a shopping center, luxury apartments, a cement plant—may procure the necessary zoning changes (whether through variances or through amendment of the zoning laws) legislatively.[31] A group interested in having a municipal swimming pool, garage, bus terminal or airport may secure their construction legislatively, if either revenue-bond financing is used[32] or some quasi-governmental agency, functionally akin to a housing authority, is created to issue any sort of bonds.[33] Land may be purchased or condemned by the municipality, in order to preserve it as a park; that decision may be reversed and the land built up (or converted to a refuse dump); then, what was built up may be torn down

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30. In certain matters, California municipalities may *elect* to assume additional referendum requirements. See note 54 *infra*.

31. If the zoning change were made by means of an amendment to the zoning ordinance, it would be subject to a review referendum under Art. 4, §1; if made by means of allowance of a variance, it would not be referrable at all. *See Essick v. City of Los Angeles*, 34 Cal.2d 614, 623-624, 213 P.2d 492, 498 (1950); *and compare Johnson v. City of Claremont*, 49 Cal.2d 826, 323 P.2d 71 (1958), *with Allen v. Humboldt County Board of Supervisors*, 241 Cal.App.2d 158, 50 Cal.Rptr. 444 (1966).

32. See p. 49-51 n. 55-56 *infra*.

33. See *Westbrook v. Mihaly*, 2 Cal.3d 765, 791 n. 50, 471 P.2d 487, 505 n. 50, 87 Cal.Rptr. 839, 857 n. 50 (1970).

again, all legislatively, without a popular referendum.[34] Under state authority, neighborhood renewal agencies may issue bonds, and may purchase and sell land, for the purpose of upgrading housing for all income levels; public housing for farm workers at all income levels may be developed; neither of these two programs requires mandatory referendum approval except to the extent that housing for "persons of low income" is involved.[35]

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34. For municipal power to maintain parks, *see* Cal. Public Resources Code §§ 5301-5303; Cal.Gov't Code § 39732. For municipal power to erect public buildings, *see* Cal.Gov't Code § 37352. The sorts of decisions mentioned in text would be subject only to a potential review referendum, under Article 4, § 1. *See Reagan v. City of Sausalito*, 210 Cal.App.2d 618, 26 Cal.Rptr. 775 (1962); *Burdick v. City of San Diego*, 29 Cal.App.2d 565, 566, 84 P.2d 1064, 1065 (1938) (dictum).

35. California law authorizes the establishment of farm labor centers to house persons and families engaged in agricultural work. Health and Safety Code §§ 36050, *et seq.* This housing is to be provided "without regard to whether such persons and families have low income." Health and Safety Code § 36051; *see* Health and Safety Code §36062. Any housing authority is given power to acquire, own, operate, construct, etc. such farm labor centers. Health and Safety Code §36056. Any and all things may be done to secure the financial aid of the federal government. Health and Safety Code §36057. "A farm labor center is declared to be public property used for essential public and governmental purposes and is for a public use and purpose and involves a governmental function of state concern. As a matter of legislative determination, it is hereby found and declared that the properties involved in farm labor centers are of such character and shall be exempt from taxation." Health and Safety Code § 36063. A housing authority *may* make payments in lieu of taxes *(ibid.)*. Only if the center is acquired by the Housing Authority as a low-rent housing project must it conform to the requirement of Article 34; and then shall not be deemed a farm labor center. Health and Safety Code §36068.

California law also authorizes the establishment of renewal area agencies which are public agencies of the state. Health and Safety Code §§33701, *et seq.* They can provide "low-income, middle-income and normal-market housing, including single- or multiple-family dwellings, and sufficient commercial establishments to serve persons living within a reasonable distance of the renewal area, and for the purpose of rebuilding or rehabilitating a renewal area to maintain its neighborhood character." Health and Safety Code §33708. This

(2) Decisions of this sort may be made without a public vote, although they "alter the characteristics of [*the*] *... very environment for generations"* (Brief for Appellant Shaffer, p. 38). The foregoing examples of the cement plant and the airport make the point. Ironically, low-income public housing projects are required to conform to all local planning, zoning, sanitary and building laws (see p. 52 *infra*); *and* they are required by Article 34 to receive the approval of a mandatory referendum. However, if anything but low-income public housing is in question, all of the planning, zoning, sanitary and building laws themselves may be amended or repealed, without the necessity of a referendum.[36] Groups seeking to change these laws have only to proceed through the normal legislative process.

(3) Similarly, decisions may be made which significantly affect the local public fisc—for example, by sanctioning property uses that render the property tax-exempt or require additional public services (see Brief for Appellant Shaffer,

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program, initiated in 1968 (Cal. Stats. 1968, c.1392, p. 2733, §1), emphasizes local participation and retention of neighborhood character, thereby taking a different approach from traditional federally financed urban renewal programs.

At the present time, no housing is owned or leased for residential purposes for other than low-income persons by any state public body or agency in California. (A. 69-70.) The only residential housing now maintained by state agencies is housing for state college and university students and faculty, and housing for employees of state institutions. *(Ibid.)* Nonetheless, the legislative authorizations described in the preceding two paragraphs would permit the development of such housing, for other than low-income persons, without a mandatory referendum.

36. The authority of local governments in California to enact these various laws are recognized as follows: zoning, Cal.Gov't Code §§65800 *et seq.*; planning, Cal. Govt Code §§65100 *et seq.*, 65300 *et seq.*; sanitary code, Cal. Health & Safety Code, §§450, 500; building code, Cal. Gov't Code §§38601(b), 38660; Cal. Health & Safety Code, § 19825 *et seq.; and see* Cal. Const., Art. XI, §§ 6, 8, 11, conferring broad municipal powers generally.

pp. 34-35), without a mandatory referendum. Any group may persuade the local governing body to cooperate in attracting a tax-exempt Hill-Burton hospital[37] to the area, or to accept the donation of some local art fancier's home as a tax-exempt public museum, without a referendum.[38]. And while a referendum is required by Article 34 in order to put five units of low-income housing on an empty lot adjacent to the police station, the police station itself may be moved without a referendum into an isolated area half-across town, thereby multiplying the general cost of police services many-fold. Needless to say, no referendum is required to support those property-owners who prevail upon the city council to keep property taxes low, even though the slightest fractional increase in the tax rate would offset a thousand times the loss in taxable property necessary to house all the poor of the vicinity in federally-funded low-income housing.

(4) Decisions may be made without a referendum to participate in numerous other federal programs,[39] including programs that radically affect land use and values,[40] and

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37. See note 40 *infra*.

38. Concerning the several sorts of tax-exempt land in California, see note 8 *supra*.

39. *See e.g., Urban Beautification and Improvement*, 42 U.S.C. §§1500-1500e (grants to state and local public bodies to assist in the acquisition and beautification of open space, and grants to preserve sites of historic value: federal assistance up to 50% of the cost; *see* Cal. Health and Safety Code §§37102-37111); *Comprehensive Planning Assistance*, 40 U.S.C. § 461 (grants principally to assist state and local governments in planning regarding increasing population in urban areas, the lack of coordinated development of resources and services in rural areas, and coordinated transportation: federal financial assistance up to 2/3 of the cost; *see*, as to urban development, Cal. Gov't Code § 65065.2); *Land and Water Conservation Fund Act*, 16 U.S.C. §§ 4601-4 to -11 (grants to states to acquire and develop land and water areas and facilities for outdoor recreation; *see* Cal. Public Resources Code §§ 5099-5099.11).

40. *See e.g., Advance Acquisition of Land for Public Purposes*, 42 U.S.C. § 3104 (grants to state and local public bodies and agen-

some that provide housing for other persons than the poor.[41] Groups who wish to take advantage of these programs may secure the necessary governmental authorization legislatively, without referendum, even though the programs have both "fiscal" and "non-fiscal" consequences (see Brief for Appellant Shaffer, pp. 33-38) which dwarf those of low-

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cies to provide financing for the acquisition of land to be utilized in the future for public purposes); *Highway Planning and Construction*, 23 U.S.C. §§101 *et seq.* (grants to the states for the construction of highways; *see* Cal. Streets and Highways Code, § 820, §§2200 *et seq.*); Community Mental Health Centers, 42 U.S.C. §§2681 *et seq.* (grants for construction of public and nonprofit mental health centers; *see* Cal. Health and Safety Code §§430, *et seq.*, particularly § 432.9); *Construction and Modernization of Hospitals and Other Medical Facilities*, 42 U.S.C. §§291 *et seq.* (grants and loans primarily to build hospitals and hospital facilities; *see* Cal. Health and Safety Code, §§430 *et seq.*); *State Mental Retardation Facilities*, 42 U.S.C. §§ 2671 *et seq.* (grants to the states to build facilities to provide services to the mentally retarded; *see* Cal. Health and Safety Code §§ 430 *et seq.*); *Public Library Construction*, 20 U.S.C. §§ 352-355 (grants to the states to provide public library services; *see* Cal. Educ. Code § 27053); *Water and Sewer Facilities*, 42 U.S.C. §§ 3101-3102 (grants to governmental bodies or agencies to construct basic water and sewer facilities including water storage, treatment and purification; *see* Cal. Water Code §§ 13600-13608).

41. *See, e.g. Housing For Educational Institutions*, 12 U.S.C. § 1749 (annual grants and loans to educational institutions to assist in providing housing for students and faculty; California received more federal assistance under this program as of 1968 than any other State in the Union, 1968 HUD STATISTICAL YEARBOOK (G.P.O., No. 1970-0-376-426) [hereafter cited as 1968 HUD STATISTICAL YEARBOOK], 292-294; *Nursing Homes*, 12 U.S.C. § 1715w (mortgage insurance for nursing homes); *Housing Loans for Elderly or Handicapped*, 12 U.S.C. § 1701q; *FHA Insured Property Improvement Loans*, 12 U.S.C. § 1703 (insurance for banks and other financial lending institutions against losses suffered as a result of loans or advances of credit for financing alterations, repairs, or improvements on real property); *VA Home Loans*, 38 U.S.C. §§ 1810, 1811 (loans to veterans to purchase or construct homes; California received more financial aid under this program than any other State as of June 30, 1968, *Progress Report on Federal Housing and Urban Development Programs* (Committee Print, No. 41-369, Subcomm. on Housing and Urban Affairs, Senate Comm. on Banking and Currency, 91st Cong., 2d Sess., March 1970), 167); *FHA Home Mortgage Insurance*, 12 U.S.C. § 1709 (insured mortgage financing

income housing. The federal Urban Renewal[42] and Model Cities[43] programs are obvious examples; appellant Shaffer's argument that local decisions connected with those programs are subject to review referenda under Article 4, § 1 (*id.*, pp. 48-49) is beside the point.[44] Groups may obtain local participation in these programs through the ordinary legislative channels; only in the case of low-income public housing are those channels blocked by the unique requirement of a mandatory, prior-approval referendum. And, within the field of low-income public housing, that requirement is a one-way roadblock; "a decision . . . not to participate in the federal . . . program," *Avery v. Midland County*, 390 U.S. 474, 484 (1968), needs no referendum.

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for the construction, purchase or rehabilitation of one- to four-family homes; through 1968, California ranks highest in the nation for federal financial assistance under this program, 1968 HUD STATISTICAL YEARBOOK, 95-96, 98-99).

42. *See* 42 U.S.C. §§ 1450-1468a, providing loans and grants to local public agencies to assist in elimination of slums and blighted areas, and to promote redevelopment, rehabilitation, and conservation of such areas by private enterprise. Since 1968, it has been provided that 20% of the units in predominantly residential urban renewal projects will be for low-income persons. 42 U.S.C. § 1455(f).

43. *See* 42 U.S.C. §§ 3301 *et seq.*, providing grants to enable cities to improve physical environment, improve educational facilities, enhance recreational facilities, improve the quality of urban life, and provide maximum opportunities in choice of housing for all citizens of *all income levels*. As of December 31, 1968, California received more financial assistance under this program than any other state. 1968 HUD STATISTICAL YEARBOOK, 356-357.

44. A mandatory referendum under Article 11, § 18, would be required only if the municipalities undertook to finance these programs by the issuance of their own general obligation bonds, not if (as is usually the case) bonds were issued by the redevelopment authority. For, as appellant Shaffer says (Brief, p. 49), authority bonds are "no charge on, or liability of, the community or burden on the taxpayer"—being, in all regards, exactly like housing authority bonds. *See* pp. 48-51 *infra*.

B. THE SELECTIVE REQUIREMENT OF PRIOR REFERENDUM APPROVAL FOR DECISIONS TO DEVELOP LOW-INCOME PUBLIC HOUSING CANNOT BE CONSTITUTIONALLY SUSTAINED UNLESS IT IS SUPPORTED BY A COMPELLING STATE INTEREST

The discriminatory incidence of Article 34 just described brings it squarely within the condemnation of *Hunter v. Erickson*, 393 U.S. 385 (1969), under the theories of either the majority or the concurring opinion in that case. Like the open-housing amendment to the Akron City Charter, Article 34

> drew a distinction between those groups who sought the law's protection [to provide low-income public housing] ... and those who sought to regulate real property transactions in the pursuit of other ends. Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule: the ordinance would become effective ... after passage by the City Council ..., and would be subject to referendum only if 10% of the electors so requested by filing a proper and timely petition. Passage by the Council sufficed unless the electors themselves invoked the general referendum provisions of [Article 4, § 1] .... But for those who sought protection [of the poor man's interest in adequate housing] ..., the approval of the City Council was not enough. A referendum was required by [Article 34, which] ... obviously made it substantially more difficult to secure enactment of [low-income housing developments] .... (393 U.S., at 390).[45]

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45. This is precisely what the court below held. A. 173-177. Appellants James *et al.* are therefore incorrect that "The test applied below makes it impossible to determine what class of persons are treated differently from those expected to benefit from low-rent housing projects" (Brief, p. 12). The favored class is precisely the favored class defined in *Hunter:* "those who sought to regulate real property transactions in the pursuit of other ends." 393 U.S. at 390.

Article 34, therefore, is not—like Article 4, § 1—an attempt to "allocate governmental power on the basis of any general principle" (*id.*, at 395; Mr. Justice Harlan, concurring). It *is* designed "with the purpose of assisting one particular group in its struggle with its political opponents" (*id.*, at 393; Mr. Justice Harlan, concurring). Not merely is "the reality . . . that the law's impact falls on the minority" (*id.*, at 391; majority opinion), but Article 34 has "the clear purpose of making it more difficult for [this minority] . . . to further [its] . . . political aims," and is "discriminatory on its face" (*id.*, at 393; Mr. Justice Harlan, concurring). *Hunter* plainly answers the argument made in support of Article 34 that the "sovereignty of a State rests in its people [and that the] . . . manner in which they distribute or parcel out its exercise is not a federal . . . question" (Brief for Appellant Shaffer, p. 55; *see* Brief for Appellants James *et al.*, p. 21):

> [I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. . . . The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed. Even though [California might have required its municipalities to proceed] . . .by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size. (393 U.S., at 392-393).

The only comprehensible distinctions of *Hunter* urged by appellants here are (1) that Article 34 in terms discriminates on grounds of poverty, rather than race; and (2) that "[i]f the poor want the affluent to provide them with housing, it would seem only reasonable that they should . . . accept the 'burden' of receiving the willing consent of a simple majority of those persons who are expected to help pay..." (Brief for Appellants James *et al.*, pp. 17-18).[46] But under the Equal Protection Clause, "[l]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored," *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 668 (1966); while any notion that discriminations limited to the beneficiaries of public welfare programs may be constitutionally excused on a principle of *noblesse oblige* is unacceptable, *Shapiro v. Thompson*, 394 U.S. 618 (1969). The States may no more wall out the poor than they may wall out the black, *see Edwards v. California*, 314 U.S. 160 (1941); *Shapiro v. Thompson, supra*, at 627-631; and it should make no constitutional difference whether they proceed to do so by geographic or by jurisprudential

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46. Other distinctions of *Hunter* offered by the appellants also lack merit. It is true that Article 34 repealed nothing (Brief for Appellants James *et al.*, p. 20), but repeal was not the key to *Hunter*. *See* 393 U.S., at 390 n. 5. It is immaterial that Article 34 "does not address itself to [economic] discrimination" (Brief for Appellants James *et al.*, p. 20), since it addresses itself to, and thwarts, the interests of only one economic class: those whom it explicitly defines as "persons of low income." It is equally immaterial that Article 34 "does not concern itself with legislation" *id.*, p. 19), since surely *Hunter* would outlaw different sets of administrative procedures for whites and blacks, rich and poor. Finally, it is simply wrong that *"Here it is not claimed that anything violates the Fourteenth Amendment except the provision for referendum itself"* (Brief for Appellant Shaffer, p. 55; emphasis in original). What violates the Fourteenth Amendment here is a *selective* referendum requirement, imposed without justification only upon one outcast group. That was exactly what violated the Fourteenth Amendment in *Hunter*.

gerrymandering. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Rather, we think it obvious, a selective referendum requirement that makes it "more difficult to enact [housing] legislation in . . . behalf" of poor persons, *Hunter v. Erickson, supra*, at 393, must fall under *Hunter* unless both the referendum requirement and its selective application against the poor are "shown to be necessary to promote a *compelling* governmental interest." *Shapiro v. Thompson, supra*, 394 U.S., at 634 (emphasis in original). The test of a "compelling" interest, with its attendant principle of "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216 (1944), to assure that the interest justifies the lines of disability that the State has drawn, *e.g., Cipriano v. City of Houma*, 395 U.S. 701, 704-706 (1969), is required here for several reasons.

First, Article 34 on its face discriminates against the housing interests of "persons of low income." Poverty is a constitutionally "disfavored" classification, *Harper v. Virginia State Board of Elections, supra*, 383 U.S., at 668, whose "suspect" nature requires "exacting judicial scrutiny," *McDonald v. Board of Election*, 394 U.S. 802, 807 (1969); *see e.g., Edwards v. California*, 314 U.S. 160 (1941); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *In re Antazo*, 3 Cal. 3 100, ..., 473 P.2d 999, 1005-1006, 89 Cal. Rptr. 255, 261-262 (1970), in "allegiance to the basic command that justice be applied equally to all persons," *Williams v. Illinois*, 399 U.S. 235, 241 (1970). This command is particularly exigent where, as here, what is being denied to the poor is a right of access to normal political channels, *Cf. Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *N.A.A.C.P. v. Button*, 371 U.S. 415, 431 (1963); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S.

127, 137-138 (1961)—a right closely akin to that of petition, *see N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-462 (1958). Surely, in the political forum as well as in the judicial forum, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has," *Griffin v. Illinois*, 351 U.S. 12, 19 (1956), quoted in *Williams v. Illinois, supra*, 399 U.S., at 241. Poor people are sufficiently disadvantaged in the political arena under circumstances of normal competition; any additional state-imposed burdens directed exclusively at them and making it uniquely difficult for them to advance their interests in that arena call for "a correspondingly more searching judicial inquiry." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-153 n.4 (1938).

Second, as the court below found (A. 176),[47] the explicit economic discrimination on the face of Article 34 carries with it an implicit racial discrimination when "the reality [of] . . . the law's impact" is considered. *Hunter v. Erickson, supra*, 393 U.S., at 391. Racial minority groups, who are disproportionately represented in the class of poor persons needing public housing, are hardest hit by Article 34. Where such racial implications of facially "color-blind" State regulations have appeared, as in *Gomillion v. Lightfoot, supra; Louisiana v. United States*, 380 U.S. 145 (1965); and *Reitman v. Mulkey*, 387 U.S., 369 (1967), the Court has given those regulations the same "searching judicial inquiry" which footnote 4 of *Carolene Products, supra*, suggested was appropriate in all cases of "prejudice against discrete and insular minorities," *e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964).

Third, exacting scrutiny is demanded in assessing dis-

47. The basis for this finding, and appellant Shaffer's ill-taken criticism of it, are discussed at pp. 65-66 nn. 71-73 *infra*.

criminations that affect "fundamental interests" of citizens. *E.g., Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Shapiro v. Thompson, supra*, 394 U.S. at 634, 638; *Westbrook v. Mihaly*, 2 Cal.3d 765, 784-785, 471 P.2d 487, 500, 87 Cal.Rptr. 839, 852 (1970). The interest of poor persons in decent, safe and sanitary housing, recognized by the United States Housing Act of 1937, is of this fundamental character. It is an interest in the benefits of a federal statute; and the States can hardly be supposed to have the same range of tolerance in drawing regulations whose effect is to grant or deny access to federal benefits, as when only state-created interests are involved. *Cf. Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 3-7 (1964); *Testa v. Katt*, 330 U.S. 386, 389-391 (1947). But the poor man's interest in a habitable house—in a "decent home and suitable living environment"[48]—is fundamental not merely because of its recognition by Congress. It is fundamental because it necessarily underlies interests that this Court has many times found to be fundamental;[49] and because only blindness could

48. "The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation." Declaration of Policy of the Housing Act of 1949, § 2, 63 Stat. 413, 42 U.S.C. § 1441. The national goal of "a decent home and a suitable living environment for every American family," was reaffirmed in the Declaration of Policy of the Housing and Urban Development Act of 1968, 82 Stat. 476, 42 U.S.C. § 1441a.

49. For example, the interest of the citizen in protecting his home from undesired intrusions, either by government, *see Mapp v. Ohio*, 367 U.S. 643, 660 (1961), or by other individuals, *see Rowan v. United States Post Office Department*, 397 U.S. 728, 736-738 (1970), supposes that he has a home whose quality is worth protecting. The

ignore today the basic, urgent quality of what President Lyndon Johnson called in 1967 "the most pressing unfulfilled need of our society"—the "need . . . to provide the basic necessities of a decent home and healthy surroundings for every American family now imprisoned in the squalor of the slums."[50]

We conclude, then, that Article 34 must be measured by the test of "compelling governmental interest." Under that test, "the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." *Westbrook v. Mihaly*, 2 Cal.3d 765, 785, 471 P.2d 487, 500-501, 87 Cal.Rptr. 839, 852-853 (1970).

C. NO CONSIDERABLE STATE INTERESTS SUPPORT ARTICLE 34'S REQUIREMENT OF PRIOR REFERENDUM APPROVAL ONLY FOR LOW-INCOME PUBLIC HOUSING

The several interests advanced by appellants in support of Article 34 plainly fail to sustain a mandatory referendum requirement imposed exclusively upon low-income public housing development. We discuss those interests *seriatim:*

1. The interests in popular democracy and in "local" control.

At the outset, we may quickly put aside the notion, ceaselessly reiterated in appellants' briefs, that Article 34 serves the general interest of grass-roots democracy—"the fundamental policy of California about the supremacy of referendum (Cal. Const., Art. IV, Sec. 1 . . .)." (Brief for Appellant Shaffer, p. 35; *see id.*, pp. 6-7, 18, 22-24, 34-35, 54-61; Brief for Appellants James *et al.*, pp. 13-14, 16-18.) That policy might support the subjection of low-income public housing

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importance laid upon a range of constitutional protections of family life, *Griswold v. Connecticut*, 381 U.S. 479, 482-485 (1965), and cases cited, involves the same assumption.

50. PRESIDENT'S COMMITTEE ON URBAN HOUSING, REPORT (A DECENT HOME) (G.P.O. No. 1969-0-313-937, 1968) [hereafter cited as A DECENT HOME], 1.

decisions to the sort of review referenda authorized by Article 4, § 1 (see pp. 29-31 *supra*); but it can hardly support the imposition of a distinctly different referendum requirement —the requirement of a mandatory prior-approval referendum—*only* upon low-income public housing decisions (see pp. 31-38 *supra*). Characterization of Article 34 as a "reaffirmation [of] ... ancient policies of universal application" (Brief for Appellant Shaffer, p. 18) treats it, inaccurately, as though it provided that public housing decisions should be referrable under Article 4, § 1. Of course it does not; and the special "more difficult" referendum which it does require exclusively for low-income public housing (*Hunter v. Erickson, supra*, 393 U.S., at 390, 393) can no more be justified by a general concern for "democracy" than could a provision forbidding low-income people to lobby at city hall.

We do not understand how concern for "local" autonomy in public housing matters (Brief for Appellant Shaffer, p. 54; Brief for Appellants James *et al.*, p. 14) supports Article 34. Local autonomy is completely preserved by the requirement that the local governing body give three kinds of approvals to every federally-funded low-income public housing development in California (see pp. 10, 12-13 *supra*). This case does not present the question whether California could require that those local approvals be given by the voters at the polls, rather than by their elected representatives, *if* decisions of that sort were generally referred to the polls under procedures "grounded in neutral principle" (*Hunter v. Erickson, supra*, 393 U.S., at 395; Mr. Justice Harlan concurring) and not particularized—as is Article 34—"with the purpose of assisting one particular group in its struggle with its political opponents" (*id.*, at 393; Mr. Justice Harlan, concurring).

2. "Fiscal interests.

Appellants make much of the monetary costs which public housing is said to impose upon the locality in which it is built.

(Brief for Appellants James *et al.*, pp. 14-15; Brief for Appellant Shaffer, pp. 18-19, 33-35). While we think that such costs are grossly exaggerated,[51] we do not deny that they exist. All government programs cost money. The point, however, is that the monetary costs of low-income public housing do not differ in either nature or degree from the costs that local governments in California can and do incur daily, by a variety of legislative enactments, without necessity of a mandatory referendum.

The only two local costs of federally-funded low-income housing identified by the appellants—and the only two "cost" items that are not fully covered by federal funds (see pp. 7-12 *supra*)—are (a) the cost of providing municipal services, and (b) the loss of property-tax revenues in excess of 10% of shelter rents. Of course, exactly the same sorts of "costs" will be incurred if the local governing body decides to build a new municipal auditorium, hospital, parking garage, ball field, swimming pool, etc., or to clear the way by zoning and planning changes for any private development of tax-exempt uses: churches, colleges, museums, libraries, and the like. If zoning and planning changes are unnecessary, private citizens in California may unilaterally devote their lands to tax-free uses (including those which require increased municipal services) without any sort of local govern-

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51. The major local "cost" item, loss of property tax revenues, is calculated by appellant Shaffer (Brief, p. 35) on the assumption that the property upon which the low-income project is constructed would have produced substantial collectible tax revenues if left to other uses. Of course, this is frequently not true of land on which low-income public housing is built. Appellant Shaffer also seems to assume that any other use of the property would make smaller demands for local services than will low-income public housing. There is no basis for such an assumption. Indeed, by reducing slum living conditions, low-income public housing may significantly decrease community-wide costs of police, fire and other services.

mental control;[52] and the State, or a state agency, may acquire land for tax-exempt uses in a city or county without a by-your-leave to the local taxing authorities or to the local tax-payers.[53] The plain fact is that California law is generally unconcerned with *any* local control over the loss of tax-ratable property (unless low-income public housing tenants are going to live there); and it leaves to local legislative competence *every* form of municipal development which may entail increased service needs (except when provision of those services is going to be made to low-income public housing tenants). Matters of this sort have never been the subject of "fiscal control" (Brief for Appellant Shaffer, p. 33) by mandatory referenda in California.

To the contrary, as we have noted at pp. 32-33 *supra*, the single instance in which a mandatory referendum has traditionally been required as a check upon local fiscal management in California is when a local governmental entity having taxing power incurs a long-term indebtedness under a general obligation bond. This is the situation defined in Article 13, § 40 (formerly Article 11, § 18) of the State Constitution, as consistently construed by the California courts.[54]

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52. Numerous tax exemptions, the creatures of state law, are described in note 8 *supra*.

53. Cal. Const. Art. XIII, § 1; Cal. Rev. & Tax Code § 202. *See Hall v. City of Taft*, 47 Cal. 2d 177, 183-184, 302 P.2d 574, 578-579 (1956); *Baldwin Park County Water Dist. v. County of Los Angeles*, 208 Cal. App. 2d 87, 94-97, 25 Cal. Rptr. 167, 172-173 (1962).

54. Certain provisions of general state law permit, but do not require, municipalities to hold prior referenda in connection with other forms of bond financing. *See* Cal. Gov't Code §§ 54380, 54478. These referendum provisions are optional with local charter governments. *City of Santa Monica v. Grubb*, 245 Cal. App. 2d 718, 54 Cal. Rptr. 210 (1966). Charter cities may also require mandatory referenda in situations where the general state law does not. For example the Charter of the City of San Jose (1965), §§ 1220-1222 requires prior referendum approval for the issuance of *revenue* bonds for certain municipal services. *Compare* text *infra*.

Appellant Shaffer argues that the case of *Housing Authority v. Dockweiler*, 14 Cal.2d 437, 94 P.2d 794 (1939), wrongly excluded housing authority bonds from the referendum requirement of former Article 11, § 18, and that Article 34 had to be adopted to "rectify this erosion with respect to low rent public housing projects . . . [so as] to bring housing within the traditional controls" (Brief for Appellant Shaffer, p. 34; *see* Brief for Appellants James *et al.*, pp. 13-14). Under clear and settled state law, however, housing authority bonds could not conceivably have been supposed to come within former Article 11, §18. Other bonds identical to housing authority bonds in terms of the character of the debtor and the debt have never been required, and are not today required, to go to mandatory prior referendum under that section, because such bonds are wholly outside the concerns of the section.

Former Article 11, § 18 (which remains identical as presently renumbered) provides that "no county, city . . . or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year," without prior referendum approval.[55] "It is settled in California and recognized in almost all of the other states that, as a general rule, a constitutional provision such as Section 18 of article XI is not violated by revenue bonds or other obligations which are payable solely from a special fund, provided the governmental body is not liable to maintain the special fund out of its general funds, or by tax levies, should the

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55. The section in terms requires approval by a two-thirds vote, but this extraordinary-majority provision was held federally unconstitutional in *Westbrook v. Mihaly*, 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970).

special fund prove insufficient." *City of Oxnard v. Dale*, 45 Cal. 2d 729, 733, 290 P.2d 859, 861 (1955). Thus, only obligations which amount to a *general indebtedness* on the part of a *tax-assessing political subdivision* fall within the constitutional limitation. *See City of Redondo Beach v. Taxpayers*, 54 Cal. 2d 126, 352 P.2d 170 (1960).

In the *Dockweiler* case, *supra*, the California Supreme Court first noted that housing authority bonds are a debt solely of the issuing authority, and are not debts of the State or of any political subdivision to which the debt limitation provision of the Constitution is applicable. The statute declares "that such bonds do not impose any liability on any person or political subdivision of the state. In fact, . . . our statute also requires the bonds to state on their face that they do not constitute a debt of the city, county, state or any other political subdivision thereof." 14 Cal.2d, at 459, 94 P.2d, at 806; *see* Cal. Health and Safety Code, § 34353. "However, even if it were assumed that housing authorities are subject to the debt limitation provision of the Constitution, its bonds being payable exclusively from the revenues or property of the project or projects which are constructed with their proceeds and with federal aid, would not constitute a debt within the meaning of the provision." 14 Cal.2d, at 460, 94 P.2d, at 806. *See* 14 Cal.2d, at 444-445, 94 P.2d, at 798; Cal. Health and Safety Code, § 34351. In short, *Dockweiler* created no "erosion"; the "traditional controls" of Article 11, § 18, have nothing to do with bonds like those which California housing authorities may issue;[56]

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56. *City of Palm Springs v. Ringwald*, 52 Cal. 2d 620, 624-625 n. *, 342 P.2d 898, 901 n. * (1959), sets out cases in which Article 11, § 18 was held inapplicable since the bonds were payable out of funds of the project benefited, and not from the general funds of a governmental body. *Dockweiler* is just one of the many cases cited.

In *Ryan v. Riley*, 65 Cal. App. 181, 190 [223 P. 1027], the

Article 34 is manifestly not framed on a theory of "fiscal control" relating to these authorities;[57] and, if it were, its selective application of popular "fiscal control" to expenditures for low-income housing, as distinguished from other expenditures which do not involve general public indebtedness, would nonetheless remain invidious and a violation of Equal Protection.

Motor Vehicle Department benefited; the special fund was derived solely from the use of highways. In *Shelton v. City of Los Angeles*, 206 Cal. 544, 546 [275 P. 421], the department of water and power benefited; the special fund was provided from revenue derived from the department of water and power. In *In re California Toll Bridge Authority*, 212 Cal. 298, 301 [298 P. 485], the Toll Bridge Authority benefited; the special fund was provided from revenues collected as tolls by the Toll Bridge Authority. In *California Toll Bridge Authority v. Kelly*, 218 Cal. 7, 13 [21 P.2d 425], the special fund was provided from tolls to be collected from use of a particular bridge for which bonds were issued. In *Department of Water and Power of the City of Los Angeles v. Vroman*, 218 Cal. 206, 211, 217 [22 P.2d 698], power facilities of the city benefited; the special fund was derived from the sale or use of electricity. In *Housing Authority v. Dockweiler*, 14 Cal. 2d 437, 460 [94 P.2d 794], the Housing Authority benefited; the revenue was derived from the housing project and any annual contributions made by the federal authorities to the Housing Authority. In *City of Glendale v. Chapman*, 108 Cal. App. 2d 74, 76, 79 [238 P.2d 162], existing waterworks benefited; the special funds were supplied by revenue collected by the waterworks. In *Board of State Harbor Commissioners v. Dean*, 118 Cal. App. 2d 628, 631 [258 P.2d 590], the San Francisco Harbor benefited; the special fund was provided from revenue derived from harbor facilities. In *City of Oxnard v. Dale*, 45 Cal. 2d 729, 732 [290 P.2d 859], a sewer system benefited; the special fund was derived from the gross revenues from the sewer system.

57. If Article 34 had been concerned with housing authority *debt* on the theory that *Dockweiler* wrongly released public housing from the "fiscal control" of former Article 11, § 18, the new Article obviously would have required a two-thirds vote to approve the assumption of indebtedness by the authorities, as Article 11, § 18 required for assumption of general public debt. *See* note 55, *supra*.

3. "Non-fiscal" interests.

Appellant Shaffer has collected a number of "non-fiscal" considerations which are said to support the requirement of a mandatory referendum only upon low-income public housing projects (Brief for Appellant Shaffer, pp. 19, 35-38; *cf.* Brief for Appellants James *et al.*, p. 14). Basically, the argument is that voters should have the right to reject projects of "institutional design and mammoth size"; projects which "tend to perpetuate rather than overcome racial segregation;" and "large concentrations of low-income housing" which create a " 'central city' divorced from its surroundings" (Brief for Appellant Shaffer, p. 36).

Low-income public housing construction—like almost any sort of construction—may, of course, be badly planned or built. That concern, however, furnishes no conceivable justification for Article 34.

First, public housing projects are "subject to the planning, zone, sanitary, and building laws, ordinances, and regulations applicable to the locality in which the housing project is situated."[58] Such regulations provide ample controls against bad construction features. Article 34 does not. Article 34, notably, requires no vote on *rich* constructions having undesirable physical or planning features: high-rise luxury apartments, for example. It requires a vote on all public housing projects for the *poor*, whatever their physical or planning features. Even were the danger far greater than it is that low-income public housing would be over-sized and ill-planned, that danger calls only for enforcement of the applicable size and planning controls, not for controls defined in terms of the income level of residents.

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58. Cal. Health and Safety Code § 34326. *See* Low-Rent Housing, Preconstruction Handbook, A HUD HANDBOOK (RHA 7410.1, June 1969) Chap. 3, § 1, 3.

But the danger is inconsiderable, except to the extent that it is caused by Article 34 and the prejudices which Article 34 expresses. In the Housing and Urban Development Act of 1968, Congress has ordered that, other than housing which is predominantly for the elderly, "the Secretary shall not approve high-rise elevator projects for families with children, unless he makes a determination that there is no practical alternative" (42 U.S.C. § 1415 (11)). Scattered sites are encouraged by HUD. Low-Rent Housing, Preconstruction Handbook, A HUD HANDBOOK (RHA 7410.1, June 1969), Chap. 1, § 1, 2d (2)). "We have moved away from the massive, monolithic buildings of the past. We are now . . . emphasizing small projects and individual units."[59] Congress has also declared that, in the administration of its financially assisted housing, "emphasis should be given to encouraging good design as an essential component of such housing, and to developing housing which will be of such quality as to reflect its important relationship to the architectural standards of the neighborhood and community in which it is situated, consistent with prudent budgeting" (12 U.S.C. 1701v (1968)).[60]

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59. Testimony of Robert C. Weaver, Secretary of HUD, in *Hearings on Proposed Housing Legislation for 1968, Before Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. (1968), 10.

60. See HUD *Circular, Quality in Public Housing*, unnumbered (Feb. 13, 1969). HUD has also implemented a program of design awards for federally financed housing, which serves as an incentive "for the community as a whole." *Hearings on Proposed Housing Legislation for 1968, Before Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong. 2d Sess. (1968), 248; 1968 HUD *Awards For Design Excellence* (G.P.O. No. 1968-0-320-834). In recent years, HUD has been given substantial recognition for its efforts to control high-rise and concentrated units, and to encourage good design and management. A DECENT HOME, at 61.

Further, HUD has an express policy of affording members of minority groups an opportunity to locate outside of areas of racial concentration. Indeed:

> Any proposal to locate housing only in areas of racial concentration will be *prima facie* unacceptable and will be returned to the Local Authority for further consideration and submission of either (1) alternative or additional sites in other areas so as to provide more balanced distribution of the proposed housing or (2) a clear showing, factually substantiated, that no acceptable sites are available outside the areas of racial concentration. (Low-Rent Housing, Preconstruction Handbook, A HUD HANDBOOK (RHA 7410.1, June 1969), Chap. 1, §1, 2.g.)

It is not federal policy that aggravates "prevailing patterns of racial segregation." (Brief for Appellant Shaffer, p. 36). It has rather been the implementation of exclusionary weapons such as Article 34.[61] "Nonghetto areas, particularly suburbs, for the most part have steadfastly opposed low-income, rent-supplement, or below-market interest rate housing, and have successfully restricted use of these programs outside the ghetto." NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT (Bantam ed. 1968) [hereinafter cited as KERNER COMMISSION], 482.

> The general tendency in recent years on the part of too many public housing authorities has been to emphasize high-rise and large-scale apart-

61. The San Jose housing development that was defeated in an Article 34 referendum in 1968 would have scattered 1000 low-income units throughout the city in order "to avoid racial and economic segregation." (A. 56.) The units were designed to avoid high population density: no more than four were to be situated in any building, nor more than one four-unit building on any lot. (A. 29.) In short, the project contained none of the objectionable features that appellant Shaffer describes, but it lost at the polls.

ment projects. This trend has been caused by many factors, notably the refusal of the dwellers in the suburbs and in the outer and middle-class sections of the cities to accept public housing. This, in turn, has driven public housing closer to the center of the cities where land costs are high. The high cost of land and the continued immigration of low-income families have then led public housing authorities to construct high-rise buildings in order to get as many housing units as possible on each acre of land. . . . Suburbanites and middle-class residents who criticize the huge projects in the central city and who, at the same time, oppose any projects in their neighborhoods, should realize that their refusal to permit the diffusion of public housing is a major factor in creating the concentration they deplore. (NATIONAL COMMISSION ON URBAN PROBLEMS, REPORT (BUILDING THE AMERICAN CITY), H. Doc. No. 91-34, 91st Cong., 1st Sess. (1968) [hereafter cited as DOUGLAS COMMISSION], 123.)

Thus, if related at all to the problem of "mammoth" public housing developments and attendant ills, Article 34 is a contributing cause, not a solution, of these evils. "[T]he removal of existing constraints on freedom of location—such as racial discrimination . . . is essential to the achievement of decent housing for all. Strong measures should be taken to remove barriers which prevent ghetto dwellers from leaving the ghetto." A DECENT HOME, at 70.

Artificial restrictions which restrict the location of subsidized housing should be eliminated so that recipients of assistance would have the widest possible choice of where to live. . . . Merely enforcing the Federal open housing provisions of the Civil Rights Act of 1968, though important, will not be enough to assure freedom of location. It serves very little purpose to tell a poor person he can move

> into a $50,000 house wherever it may be located; we must allow for an adequate supply of housing for low- and moderate-income families in all parts of our metropolitan areas. (A DECENT HOME, at 47-48.)[62]

As for the other "major sociological effects" of public housing developments (Brief for Appellant Shaffer, p. 38) we see no basis in them for a discriminatory referendum requirement leveled only against the poor. All governmental programs in our complicated urban culture have major sociological effects. Yet only low-income public housing, which threatens to mix the poor with the rich and the black with the white, has the kind of effects with which the sociology of Article 34 is concerned. We certainly do not quarrel with the several criticisms of public housing made by the report, MORE THAN SHELTER, that is cited in Appellant Shaffer's Brief, p. 38.[63] More relevant than those criticisms is the report's conclusion that:

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62. *See* [CALIFORNIA] GOVERNOR'S ADVISORY COMMITTEE ON HOUSING PROBLEMS, REPORT (HOUSING IN CALIFORNIA) (1963) [hereafter cited as HOUSING IN CALIFORNIA], 39, Appendix 124.

63. It is unquestionably true that, too often, public housing has not done enough to improve the lives of low-income tenants. The Federal Government has recently taken strides in this direction.

> For public housing to meet its full responsibility toward those with the lowest incomes, it must provide more than shelter. Equally it must help residents improve their economic status. And in many cases it must foster adjustments to urban life . . . Many local housing authorities have endeavored, with limited resources, to assist these families by counseling and referral to community agencies that could help them.
>
> Unfortunately, the funds available to the local housing authority have generally been inadequate to perform these much needed services. We are therefore recommending, as provided in section 204 of the bill, that authority be given to make annual grants to housing authorities to assist them, where necessary, to carry out these much

> Active opposition, obstructionism, . . . at state and local levels have been even more responsible for failure to improve housing conditions than the above-mentioned shortcomings of the Federal establishment. (MORE THAN SHELTER, Research Report No. 8, for the National Commission on Urban Problems (1968) [hereafter cited as MORE THAN SHELTER], 69.)

It is accordingly ironic that Article 34, a legal bastion of obstructionism, is now sought to be justified upon the ground that the federal housing program—and it alone of all government schemes—has proved too risky and equivocal "sociologically" to import into a community by mere governmental action, without a popular plebiscite.

4. Promoting consideration of alternative programs.

Appellant Shaffer suggests that there are "other federal housing programs" which "offer significant alternatives" to public housing, and that Article 34 is warranted because

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needed programs of tenant services. (Testimony of Robert C. Weaver, Secretary of HUD, in *Hearings on Proposed Housing Legislation for 1968, Before Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. (1968), 10-11; *see also* Low-Rent Housing, Preconstruction Handbook, A HUD HANDBOOK, (RHA 7410.1, June 1969), Chap. 3, § 4 (Community Wide Planning To Meet All Needs).)

Financial support for tenant services has indeed been provided, and preferential treatment is given to programs which involve "maximum feasible participation of the tenants in the development and operation of such tenant services" (42 U.S.C. § 1415 (10)). The law defines tenant services as including counseling on household management, housekeeping, budgeting, money management, child care, advice as to resources for job training and placement, education, welfare, health and other community services; services which are directly related to meeting tenant needs and providing a wholesome living environment. *Ibid.*

"[r]ejection of a project forces authorities to face the issues of curative relief through the use of new approaches." (Brief for Appellant Shaffer, pp. 39-40; *see also* Brief for Appellants James *et al.*, pp. 15-16.) Like the previous governmental "interests" conjured up in support of Article 34, this one fits the Article very badly. There are, of course, "significant alternatives" to every governmental program; if mandatory referenda were required whenever legislative or administrative choice had to be made among "significant alternatives," California would be referendum-ridden to a standstill. Article 34, however, is concerned *only* with "alternatives" to public housing for persons of low income. "Characterizing it simply as a public decision to move slowly in [this] ... delicate area ... emphasizes the impact and burden of [Article 34] ..., but does not justify it." *Hunter v. Erickson supra*, 393 U.S., at 392.

While *Hunter* thus completely answers this point, we think it would be unfortunate if the Court were left with the false impression, factually, that "other federal housing programs" *do* "offer significant alternatives to public housing" in the sense that appellant Shaffer asserts. In many localities (and, particularly, in San Jose and San Mateo Counties) they simply do not. A brief description of each of these programs will indicate why—however desirable they may be—they are often altogether useless as a means of filling the basic low-income housing need served by direct construction of public housing.

a. The Leased-Housing Program. Described by Congress as "supplementary" to the provisions in the 1937 Act providing for direct construction (42 U.S.C. § 1421b(a)(1)), the leased-housing program depends upon availability of an adequate pool of privately built, rentable, cheap, decent, safe,

and sanitary housing.[64] The record shows clearly that this program has not worked to meet the need for low-cost housing (A. 21-22, 31, 61, 123-124), for several reasons: (1) high rentals in privately constructed housing, which the Housing Authority cannot afford even with federal subsidy (A. 22, 24, 157-159); (2) unavailability of units because of the low vacancy factor (A. 31, 61, 124, 143); (3) refusal of local governments to allow the leasing program to operate (A. 31; *Draft, The Housing Situation: 1969*, p. 84: A. 123); and (4) refusal of owners to rent to the Housing Authority, sometimes based on unwillingness to rent to racial minorities (A. 140). The Directors of the Housing Authorities of Fresno, Sacramento, Santa Clara, and San Mateo, men charged with responsibility for providing housing for more than 7,000 poor families, state unequivocally that they need relief from Article 34 to do the job, so that their respective authorities can construct the necessary units. Each now uses the leased housing program, but all agree that that program cannot fulfill the need and that it can serve only as a supplementary program to direct construction. A. 21-22, 24, 31-33, 122-124; *see also* A. 157-159.

Appellant Shaffer is incorrect in asserting that the San Jose Housing Authority has nearly 2,000 leased units (Brief for Appellant Shaffer, p. 40). The number of 1933 units cited in the Lockfeld affidavit (A. 61) is the combined figure for the San Jose and the Santa Clara Housing Authorities; Mr. Lockfeld expressly states that the Authorities cannot succeed in finding enough units to reach the authorized maximum set by HUD *(ibid.)*; and, while "1,071 additional families are eligible for housing, and 782 are pending eligibility clearance," there is no available housing for them *(ibid.)*.[65]

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64. The program is described at p. 7 n. 6 *supra*.

65. Leased housing presents a further problem in California.

b. Section 236 and the Rent Supplement Program. In 1968, Congress enacted § 236 of the Housing Act, providing interest reduction payments on mortgages for nonprofit or limited profit sponsors, as incentives to build privately financed moderate-low-income projects (12 U.S.C. § 1715z-1). *See* Rental Housing for Lower Income Families (Section 236), A HUD HANDBOOK (FHA 4442.1, Oct. 1968). However, rent-supplement payments are necessary for persons of low income to afford to live in § 236 projects; and these are authorized for only 20% of the units.[66] As a result, § 236 housing is reserved primarily for moderate-income persons. DOUGLAS COMMISSION, 174. "Except in few cases, families with incomes below $4,000 cannot take part in the new interest rate subsidy program. For families at or below the poverty level, public housing still is the major effective program." *Ibid.* "Their needs will have to be met through other means, primarily through public housing . . . if it is to be met at all." *Ibid.*

Moreover, § 236 is (i) inadequately funded, *see* Sloane, "Toward Open and Adequate Housing," 1 Civil Rights Digest, No. 3, pp. 1, 7 (U.S. Commission on Civil Rights, 1968); *Progress Report on Federal Housing and Urban Development Programs* (Committee Print, No. 41-369, Subcomm. on Housing and Urban Affairs, Senate Comm. on Banking & Currency, 91st Cong., 2d Sess., March 1970) [hereafter cited *Progress Report*], p. 24; and (ii) dependent for its imple-

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While the State Attorney General has ruled that the program does not require voter approval under Article 34, 47 Ops. Cal. Atty. Gen. 17 (1966), this question has never been litigated. The leased housing program may be judicially held subject to Article 34, which, by its language, encompasses all low-rent housing "developed, constructed or acquired in any manner" by the Housing Authority. And, of course, if Article 34 can constitutionally be applied to direct construction, it can constitutionally be made applicable to leased housing as well.

66. See pp. 7-8 n. 6 *supra*.

mentation on the local existence, vigor, initiative, and resources of nonprofit or limited profit sponsors. The scarcity of all of these quantities seriously handicapped the predecessor to § 236, the § 221(d)(3) program. *See* DOUGLAS COMMISSION, 148. Apart from its application in § 236 projects, the entire rent supplement program is dependent on private sponsors; this and other drawbacks severely limit its utility. Welfeld, *Rent Supplement and the Subsidy Dilemma: The Equity of a Selective Subsidy System,* 32 LAW & CONTEMP. PROB. 465 (1967).

c. Section 235. Although not mentioned by appellants, one other federal housing program merits note. This is the § 235 program, titled Homeownership for Lower-Income Families, which was authorized by the 1968 Housing and Urban Development Act (12 U.S.C. § 1715z). Under § 235, mortgage loans are made by private lenders to lower-income families at market rates of interest; HUD makes periodic payments to the lenders to reduce the mortgage interest rate. The amount of the mortgage cannot exceed $18,000 (or, in some circumstances, $21,000 in high-cost areas), 12 U.S.C. § 1715z(b)(2),(i)(3), including closing costs; and the minimum down payment by the family is $200, Homeownership for Lower Income Families (Section 235), A HUD HANDBOOK (FHA 4441.1, Oct. 1968), 7-9. This program also principally benefits the moderate-income family. Low-income families such as the appellees cannot afford $200 for a down payment. Nor can they afford home ownership, since the federal mortgage reduction payments do "not include the cost of property maintenance and repairs, heating, electricity and fuel, and similar expenses." *Id.,* at 16.[67] In addition, (i) as the record

67. The asset limitations defined for participation in the program make it clear that the intended beneficiaries are in a higher income bracket. A family of 4 for instance could have assets of $4,000. *Id.,* at 13.

shows, there is a shortage of houses available for $21,000 or less (A. 59; cf. A. 123, 125, 157); and (ii) the § 235 program suffers the additional malady of § 236: inadequate funding. *Progress Report*, 23.

Examination of these several "alternatives" to low-income public housing merely underscores the plight of the very poor. For them, in many localities, direct construction of public housing developments remains the single hope of a decent home and a suitable living environment. Article 34 selectively removes from local government the power to undertake this single program. It requires the poor, and the poor alone, to bear the burden of a mandatory referendum before government may act in their behalf. It is discriminatory on its face; it is unjustified by any of the excuses proferred to condone the discrimination; and it violates the Equal Protection Clause of the Fourteenth Amendment, as the court below held.

II

Article 34 Also Violates the Equal Protection Clause Because It Authorizes and Encourages a Racial Veto Over the Distribution of Federal Funds for Public Housing

The highly selective coverage of Article 34 and the hollowness of the reasons put forward to justify its unique classification (pp. 45-58 *supra*) should leave no doubt concerning its actual design and function. This will not be the first time that racial discrimination has come to this Court dressed in trappings of concern for "property values" and local "self-determination" of property uses. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Reitman v. Mulkey*, 387 U.S. 369 (1967). *See* the *Los Angeles Times* editorial in support of Article 34 at p. 15 n. 9 *supra; see* A 122, 127, 132-133; *and see* HOUSING IN CALIFORNIA, 42.

Racist fear of residential integration is perhaps the most deep-seated form of this tragic American sickness, as the Court recognized in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-444 (1968). *See, e.g., Buchanan v. Warley*, 245 U.S. 60 (1917); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Hunter v. Erickson, supra; Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). While the Justices have sometimes disagreed as to whether it is legally curable in its purely private form, *ibid.*, there has never been a question that its legitimation by any form of governmental authority is unconstitutional. *E.g. Buchanan v. Warley, supra; Shelley v. Kraemer, supra; Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970); *Gautreaux v. Chicago Housing Authority*, 296 F.Supp. 907, 304 F.Supp. 736 (N.D. Ill. 1969); *Hicks v. Weaver*, 302 F.Supp. 619 (E.D. La. 1969); *Kennedy Park Homes Assn., Inc. v. City of Lackawanna*, 39 U.S. L. Week 2124 (W. D. N. Y., August 13, 1970); *Banks v. Housing Authority of San Francisco*, 120 Cal.App. 2d 1, 260 P.2d 668 (1953). American government may neither put race on the agenda as a basis for private decision-making, *Anderson v. Martin*, 375 U.S. 399 (1964), nor confer government's ordinary decisional powers upon private parties in a form that authorizes and condones racism in their exercise, *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry V. Adams*, 345 U.S. 461 (1953).

Article 34 does both of these things. To be sure, it does not speak of race in terms. But the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination," *Lane v. Wilson*, 307 U.S. 268, 275 (1939); and, once Article 34 is considered in context, "the conclusion [is] . . . irresistible"[68] that it is simply a means of creating a white middle-class veto over black and brown, lower-class immi-

68. *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

gration into the traditional havens of residential segregation. The Article can have no other conceivable function or effect.

We have already shown that there is no warrant or explanation for Article 34 in any general, nondiscriminatory policy of California government. This unusual, highly selective abrogation of governmental power is explicable only as an exclusionary device by which local communities can be assured that they will not find themselves suddenly at home with the unwanted, unwashed populations of low-income public housing projects.

> The opposition to public housing, based on a four-fold set of objections, has been strong almost from its beginning in this country. It is compounded of several elements: (a) a dislike of public activity in such an intimate family matter as housing; (b) the fear of undue government expenditures; (c) a desire to keep the poor physically at a distance; and (d) deep racial prejudices on the part of some whites. The latter two deserve special attention. They are evident almost everywhere in this country. Public housing is by definition and intent housing for the poor. About one-third of the urban poor are nonwhite, and more than half of the families in public housing are black. Thus these two major sources of opposition combine and fuse into a so far unyielding roadblock. (DOUGLAS COMMISSION 129.)

Manifestly, Article 34 is not framed on a general theory of "dislike of public activity in . . . housing",[69] nor a fear of undue governmental expenditures.[70] It is framed exclusively

69. This concern would equally condemn all public housing projects in a locality. But Article 34 is fashioned to permit the voters to pick and choose on a project-by-project basis.

70. See pp. 46-51 *supra*.

as a portable "off-limits" sign against the poor, non-white minority.

And, as the court below found, this is its effect: "the impact of the law falls upon minorities." (A. 176.)[71]

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71. Appellant Shaffer attacks this finding, as follows: She *first* cites special census figures purporting to show that in 1966, in the City of San Jose, 1.4% of households with income below $3,000 were black (citing KAISER ENGINEERS, HOUSING STUDY: PHASE I—PUBLIC HOUSING, FOR CITY OF SAN JOSE, CALIFORNIA (Report No. 70-10-R, March 1970), V-2); she *then* compares this figure with an affidavit (A. 32) which establishes that blacks were "slightly more than 1%" of the Santa Clara population in 1969; and she *thereupon concludes* that "poverty does not equal race in San Jose or Santa Clara County" (Brief for Appellant Shaffer, p. 30). This attack is (a) improper; (b) unsound; (c) unmathematical; and (d) irrelevant:

(a) It is improper because it goes outside the record. The KAISER document is not in evidence and—as a private contract study—is not judicially noticeable. In addition, appellant Shaffer reports its contents selectively, with a significant omission. The 1.4% figure appears on p. V-2; however, immediately thereafter, on p. V-3 appears the author's own interpretation: "Information gathered from the Model Cities Program and local realtors indicates that the *disproportionately larger number of low income minority households* remains approximately the same in the city today" (emphasis added).

(b) It is unsound because it purports to compare noncomparable figures: percentages for 1966 with 1969; San Jose City with Santa Clara County; and *households* with *persons*.

(c) It is unmathematical because it insinuates that a group which is 1% of the total population but 1.4% of the poor population is "no poorer than the population as a whole." That conclusion depends upon the characteristics of the total population in consideration, but will very probably be wrong most of the time. *Assume*, for example, a total population of 300,000 persons. (We do not know what the actual figures were in the census reported by KAISER.) A black percentage of 1% would be 3,000 persons. Now, if 20% of the total population were poor (60,000), and if 28% of the black population were poor (840), blacks would be 1.4% of the poor population. Or, if 33% of the total population were poor (100,000) and if 47% of the black population were poor (1,400), blacks would be 1.4% of the poor population. Or if 50% of the total population were poor (150,000), and if 70% of the black population were poor (21,000). blacks would be 1.4% of the poor population.

(d) It is irrelevant because the court below was not considering the question—as appellant Shaffer prefers to do—only in the context of the City of San Jose. The court was considering a constitu-

Inevitably, this law's impact falls upon minorities, both because minorities are disproportionately represented among poor persons[72] needing public housing[73] and because endemically a referendum works to the minority's disadvantage.[74] This is particularly the case when the issue posed by the referendum goes to the heart of the question whether residential segregation should be preserved, and when there is no other apparent reason why public housing projects go to the polls. The rhetoric of Article 34—exactly like that of Proposition 14 considered by this Court in *Reitman v. Mulkey*,

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tional provision of state-wide application, and had before it (a) affidavits relating to both San Jose and San Mateo County (see note 73 *infra*), and (b) judicially noticeable materials, brought to its attention in briefing below, relating to California and the Nation (see notes 72-73 *infra*). It cites Santa Clara County statistics in support of the proposition that it is "increasingly clear" that minority groups comprise the poor. (A. 176 n. 2.) *And see Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F.2d 291, 296 (9th Cir. 1970), judicially noticing the same indisputable point.

72. "In both 1968 and 1959 the poverty rate among persons of Negro and other races was about three times the rate among whites." UNITED STATES BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS (Series P-60, No. 68), *Poverty in the United States: 1959 to 1968* (G.P.O., December 31, 1969), 1. *And see, e.g.*, DOUGLAS COMMISSION 45: "In 1967, 41 percent of the nonwhite population was poor, compared with 12 percent of the white population. Nonwhites thus constitute a far larger share of the poverty population (31 percent) than of the American population as a whole (12 percent). Moreover, the nonwhite proportion of the poverty population has been increasing, slowly but steadily, since the first racial count was made in 1959; it was 28 percent then, and 32 percent by 1967."

73. *See, e.g.*, MORE THAN SHELTER 35 ("In proportion to their numbers among low-income families, more nonwhites than whites live in public housing"); A DECENT HOME 42 ("The nationwide proportionate need among nonwhites will be almost three times more acute than among the white majority"). *See also* DOUGLAS COMMISSION 114; KERNER COMMISSION 467-474; HOUSING IN CALIFORNIA 38-42; A. 61-62, 126, 128, 133, 138, 143-144, 148, 154-155; *Draft, The Housing Situation:* 1969, pp. 49-53.

74. *See Hunter v. Erickson*, supra, 393 U.S., at 391.

387 U.S. 369 (1967)[75]— is of course, that the community should have "the right to determine its own future course."[76] Yet the voter knows that his elected representatives are permitted to steer the community's course in all other matters of similar import, and that his vote is required only in this instance where an influx or relocation of minority people is at stake.

We submit that Article 34 is unconstitutional because, in this setting, it unmistakably authorizes and invites a racial veto within the administration of a governmental benefit program. Surely, Article 34 is far less "neutral" than was Proposition 14. For, while Proposition 14 might possibly have been perceived as nothing more than a governmental decision not to forbid private discrimination — and thus to allow a "right to discriminate" only where the Constitution permitted — Article 34 incorporates the right to discriminate into the governmental machinery itself. It makes

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75. Compare the Argument in Favor of Article 34, pp. 14-15 *supra*, with the following official Argument in Favor of Initiative Proposition No. 14 *(Proposed Amendments to Constitution, Propositions and Proposed Laws, Together With Arguments* (To Be Submitted to the Electors of the State of California at the General Election, Tuesday, Nov. 3, 1964):

> Your "Yes" vote on this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish, without interference by State or local government ....
>
> Your "Yes" vote will require the State to remain neutral: Neither to forbid nor to force a home or apartment owner to sell or rent to one particular person over another....
>
> ... It will restore to the home or apartment owner, whatever his skin color, religion, origin, or other characteristic, the right to sell or rent his property as he chooses. It will put this right into the California constitution, where it can be taken away only by consent of the people at the polls.

76. See p. 15 *supra*.

a governmental decision turn upon a popular plebiscite wherein race is plainly on the agenda.

We do not urge that all referenda in public housing matters would be invalid for this reason. Nor does our submission seek to have the Court review the mental processes of voters at particular referenda, to determine whether they voted for constitutionally forbidden reasons. *Compare Spaulding v. Blair*, 403 F.2d 862 (4th Cir. 1968); *Ranjel v. City of Lansing*, 417 F. 2d 321 (6th Cir. 1969); *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F. 2d 291 (9th Cir. 1970). The very difficulty of that sort of subjective inquiry warns against allowance of selective and extraordinary referendum procedures that are calculated by their nature to promote unlitigable discriminations. The road that we ask the Court to follow in overturning such procedures is an old one. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *see, e.g., Louisiana v. United States*, 380 U.S. 145 (1965); *Whitus v. Georgia*, 385 U.S. 545 (1967).

In each of these cases, statutes were invalidated not merely as applied, but also on their faces. They were unconstitutional not merely because they had in fact been misapplied but also because, in their setting, they were bound to be misapplied; because they inaugurated a licensing regime of "purely personal and arbitrary power" (*Yick Wo v. Hopkins, supra*, 118 U.S., at 370) in a racial context. This is true, also, of Article 34. Its selective and discriminatory imposition of a unique referendum requirement for low-income public housing—a requirement unexplained and unexplainable except as the authorization of a racial veto against residential integration — violates the Equal Protection Clause.[77]

77. "For, the very idea that one man may be compelled to hold . . . the means of living, or any material right essential to the en-

III

Article 34 Is Invalid Under the Supremacy Clause Because It Is Inconsistent With the Procedural Scheme of the Federal Housing Act of 1937, Frustrates the Act's Purposes, and Burdens Its Operation

Laws enacted pursuant to powers delegated to the United States under the Constitution are the supreme law of the land, and state laws inconsistent therewith are invalid. United States Constitution, Art. VI, cl. 2; *McCulloch .v Maryland*, 4 Wheat. 316 (1819). This is true even where federal laws create optional programs that the States are free to take or leave: if a State elects to participate in any such program, it must comply with the federal law that defines the program's procedures and purposes. *King v. Smith*, 392 U.S. 309 (1968); *Thorpe v. Housing Authority*, 393 U.S. 268 (1969). Any attempt by a State to "defeat or handicap a valid national objective" is impermissible. *Nash v. Florida Industrial Commission*, 389 U.S. 235, 239 (1967). A state law cannot stand when it "either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created." *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896), cited with approval in *Nash v. Florida Industrial Commission, supra*, 389 U.S., at 240.

Article 34 violates these principles. It erects a serious impediment to the realization of paramount federal goals. It frustrates the congressionally declared policy of pro-

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joyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins, supra*, 118 U.S., at 370. And the fundamental rights against arbitrary and discriminatory governmental action "may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

viding desperately needed housing for the poor. It undertakes to license access to the benefits of the federal housing program, and to do so in a form that encourages arbitrary and discriminatory exercise of the licensing power. It does these things by imposing a procedural requirement upon the administration of the federal program that adds to, and is inconsistent with, the procedures specifically and carefully detailed by Congress.[78] "The question is whether California may impose this restraint or control . . . " *Public Utilities Commission of California v. United States*, 355 U.S. 534, 543 (1958). We submit that it may not, for several reasons.

First, Article 34 is inherently inconsistent with the federal procedural scheme. Congress has written into its housing program for the poor a careful description of federal-state interaction and cooperation—of federal financial participation and local governmental self-determination. While this mix of federal money and local governmental control is not unique,[79] its intended implementation is explicitly structured by procedures set forth in the Housing Act of 1937. "In recognition that there should be local determination of the need for low-rent housing to meet needs not being adequately met by private enterprise," 42 U.S.C. 1415(7), Congress required that there should be certain quite specific determinations made by the local governing body: first, to

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78. At pp. 76-78 *infra* we will discuss provisions of appropriations legislation in 1952, 1953 and 1954 which assumed the existence of, but did not authorize, local referenda. Appellants admit that these provisions "are not now part of the Congressional enactment" (Brief for Appellant Shaffer, p. 53). We will show, in addition, that Congress never approved or prescribed any form of local referendum, but rather addressed itself to an existing phenomenon, and to the fiscal problems that it presented.

79. *See, e.g.*, the Model Cities program, note 43 *supra*.

approve the application for a preliminary loan in order to initiate the project, 42 U.S.C. § 1415(7)(a)(i); second, to agree to provide the necessary cooperation before the federal government would finance the project fully; 42 U.S.C. § 1415(7)(b)(i). Under the federal act, the local Housing Authority must also be satisfied, and must satisfy HUD, concerning the need for the housing. 42 U.S.C. § 1415(7)(a)(ii).

Article 34 engrafts upon this articulated procedure the requirement of popular approval by referendum of each and every proposed low-rent housing project. This additional requirement results in a congressionally unintended veto of every project that loses at the polls. But that is not its only effect. It discourages even the planning of projects;[80] it is costly and time-consuming in *every* case; and it forces the poor to battle for the benefits of the federal program by a political campaign for which they are ill-suited.[81] Surely, this kind of obstruction of the Housing Act of 1937 cannot stand under the Supremacy Clause.

But Article 34 is also inconsistent with the Act at a more fundamental level. It converts the national policy of "a decent home and a suitable living environment for every American family"[82] into a matter of local charitable grace,[83] subject to local licensure in a form calculated to invite racial discrimination or mere arbitrary veto. Persons better situated, uncaring of the plight of the poor and prejudiced

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80. *See* A. 31, 122-123, 130, 152.

81. *See* A. 23.

82. *See* note 48 *supra*.

83. *See* Brief for Appellants James *et al.*, pp. 17-18 "If the poor want the affluent to provide them with housing, it would seem only reasonable that they should expect and be willing to accept the 'burden' of receiving the willing consent of a simple majority of those persons who are expected to help pay...."

against minorities, may make a mockery of the equal and fair distribution of federal benefits. This is not what Congress intended. We repeat the vital federal objectives defined in the 1937 Act:

> It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to . . . remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income . . . (42 U.S.C. § 1401.)[84]

These objectives are plainly subordinated, where they are not wholly flouted, by Article 34. We need not rely upon the view of the Article entertained by its most extreme supporters—for example, the *Sacramento Union* of November 4, 1950 (vol. 151, No. 75,213), p. 10 which urged its adoption "to call a halt, in California at least, on the government planning nonsense"—in order to point up that, at the least, Article 34 authorizes and invites local voters to abrogate the policies of the Act in favor of their own. These latter policies are not the ones whose accommodation with the federal program Congress assured by means of the "local determination" recognized under procedures specified in the Act itself (pp. 70-71 *supra*); they are not any set of legitimate, consistent, non-arbitrary local concerns (*see* pp. 45-62 *supra*); they can only be invidious. Yet the very function of Article 34 is to prefer them to the national housing policy.

The conflict between the purposes of the Housing Act and those of Article 34 is exemplified by this record. The appel-

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84. *See* also 42 U.S.C. § 1441(a), note 48 *supra*, which recognizes as a national housing goal the realization as soon as feasible of a decent home and a suitable living environment for every American family.

lees, 41 persons of low income, are now living in overcrowded[85] vermin infested, substandard housing.[86] Because of the rents they are forced to pay, even for this sort of demeaning housing, they are deprived of other necessaries.[87] Unavailability of decent low-cost housing has necessitated the tragic breaking up of families.[88] More than 2,779 families in San Mateo County and in the City of San Jose are in basically the same situation as the individual appellees, and share the waiting lists for low rent housing.[89] There are 1,000 families waiting for decent sanitary low-cost housing in Fresno;[90] and 2,862 on the Sacramento Housing Authority list.[91] The lists would be longer if not for the excessively long delay in obtaining a determination of eligibility, and the hopelessness of going through that process when it is widely known that no housing is available.[92]

Article 34 is the roadblock to providing the low-cost housing which is so desperately needed.[93] In 1968 a low-rent housing proposal submitted to the voters in San Jose, pursuant to Article 34, was defeated, A. 28-30; two similar proposals met defeat in San Mateo County, A. 114-121. In the opinion of the Director of the San Mateo County Housing Authority, any low-income public housing proposal would be overwhelmingly defeated at referendum, because the

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85. A. 14, 17, 19, 104, 106, 108, 110.

86. A. 17, 19, 60, 67-68, 104, 108, 110.

87. A. 20, 105, 107.

88. A. 14, 19, 104, 107, 129-130.

89. A. 56, 122-124.

90. A. 21.

91. A. 23.

92. A. 110, 124; *see A. 21; Draft, The Housing Situation: 1969,* 42.

93. A. 21, 23, 31-33, 122-124, 126, 128, 130, 133, 135-136, 138, 141, 143-144, 153, 155.

predominant middle-and-upper income residents fear devaluation of their property and an influx of low-income and minority groups, A. 122. This view is shared by the Directors of the Housing Authorities in Fresno and Santa Clara Counties,[94] and by numerous residents of San Mateo and Santa Clara counties who have had long experience in the housing area.[95]

The results of referenda across the State of California have significantly impeded the implementation of the federal low-income public housing program in the State. From 1951 through mid-1968, about half of the low income units proposed to the California voters were defeated (A. 34-37).[96] In 1963, the Governor's Advisory Commission on

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94. A. 21-22, 31-32.

95. A. 126, 128, 130, 133, 135-136, 138, 141, 143-144, 153, 155.

96. Appellant Shaffer says that she questions whether this document, appended to plaintiffs' memorandum of law filed with the complaint in the *Valtierra* case, "is properly part of the record, but [she does] . . . not dispute its statistics." (Brief for Appellant Shaffer, p. 28, n. 14.) It is unsurprising that she does not dispute the statistics, since the document in question was reproduced from an appendix to a submission by the California Real Estate Association to the California Constitutional Revision Commission in support of the retention of Article 34. *California Real Estate Association, Retention of Provisions for Elector Approval of Public Housing—Article XXXIV—in the California Constitution* (Presented to the California Constitution Revision Commission, August 1968), Appendix 2. Its summary totals were relied upon in a Drafting Committee report, *California Constitution Revision Commission, Report of the Article XXXIV Committee* (December 1968), 8, 11, and so are judicially noticeable. As for the posture of the document in this record, it is true that there was no formal verification of it, as there should perhaps have been. However, the document related to matters of public and official record; it was on file in this action, as a part of plaintiffs' legal submission, from the date of filing of the complaint; all of the defendants below had ample opportunity to question or to controvert it; and they did not do so for the obvious reason (as appellant Shaffer admits) that the document was not controvertible.

Housing Problems recommended repeal of Article 34 because of its harmful effect on the low-cost housing program.[97] Six years later, the Association of San Francisco Bay Area Governments published an extensive report on housing which summarizes California's experience with the several federal programs:

> California utilization of federal housing assistance indicates an under-utilization of socially oriented housing programs in the light of needs within the State. Programs focused on low- and moderate-income housing have not been used to the same degree as programs such as F.H.A. . . . which provide mortgage insurance for the middle- and upper-income consumers . . . This emphasis on middle-class values is also reflected by the fact that California leads the rest of the nation in neighborhood facilities projects, urban beautification, urban mass transportation . . . 701 planning assistance for small areas and open space land program approvals. *It is interesting that California falls behind primarily in program areas dealing with low-income families.*

The same cannot be said, unfortunately, for the additional statistics which appellant Shaffer seeks to interject into the appeal for the first time in this Court. (Brief for Appellant Shaffer, p. 29.) Those figures do not appear in any official HUD publication; the "document" which appellant Shaffer describes as "supplied by" the HUD regional office *(ibid.)* was prepared and sent by that office to appellant's counsel under date of "June 1970" at his request. When we wrote to the regional office for the same information, we received an updated version (dated August 3, 1970), which lists one 200-unit referendum lost in Fresno County, *May 13, 1969*, that is not on the earlier list sent to appellant's counsel. We do not know how or by whom these lists were compiled; obviously, the first was either incomplete or careless; there is no reason to think better of the second. In any event, the additional statistics are essentially insignificant; after they are taken into account, it remains true that about half of the public housing units proposed at referenda in California since 1951 have been defeated.

97. HOUSING IN CALIFORNIA, 65.

> *The significance of the under-utilization of socially-oriented programs is that low-income households in California have less opportunity for achieving decent housing through federal assistance than if their incomes were higher.* (ASSOCIATION OF BAY AREA GOVERNMENTS, REGIONAL HOUSING STUDY (Supplemental Report RA-4, October 1969), 18-21; emphasis added. *See also* notes 39-41 *supra.*)

Article 34 has proved to be—as it was designed to be, and can function only to be—an obstructive barrier to low-income federally assisted housing. It thereby defeats and handicaps a valid national objective, *Nash v. Florida Industrial Commission, supra,* 389 U.S., at 239, and violates the Supremacy Clause.

In making this submission, we do not ignore those provisions of the Independent Office Appropriations Acts of 1952, 1953, and 1954 that are relied upon by appellant Shaffer to demonstrate congressional recognition of the "propriety and reasonableness" of Article 34. (Brief for Appellant Shaffer, p. 7.) The appropriations acts, however, show no such thing. They do not deal with the propriety or the permissibility of popular referenda in administration of the federal housing program. Rather, confronted with the fact that—whether by referenda or other state procedures—localities might subsequently abandon public housing projects that they had begun and contracted to complete with federal money,[98] Congress enacted pro-

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98. A celebrated instance involved Los Angeles, where the city council retracted its agreement for local cooperation after the Federal government had entered into an Annual Contributions Contract with the local housing authority. Amidst litigation precipitated by that *contretemps,* an Article 34 referendum was held, and the low-income project proposal was defeated. (99 Cong. Rec. 3587 (House, April 22, 1953).) It appeared that the federal agency had continued to throw good money after bad throughout this enterprise *(see* note 100 *infra),* and Congress was understandably troubled.

cedures to resolve the ensuing fiscal and contractual entanglements.

An identical proviso was enacted for fiscal years 1952 and 1953, providing that the Federal government would not continue federal financing if a project was once rejected by public vote or by a local governing body,[99] unless the project was subsequently reapproved by the same mechanism that had disapproved it. The simple purpose is obvious: to keep federal money out of projects whose future was clouded. In 1954, a more elaborate provision of the same sort was made, which also dealt expressly with the question who should shoulder the financial losses of aborted projects. This provision, generally called the Phillips Amendment (which repealed and superseded the earlier two provisions, 36 COMP. GEN. 434 (1956)), essentially required the locality to repay the federal government for expenditures prior to the date of a clear local abandonment (by referendum or local governmental action); but, if the federal agency expended further sums after that date,[100] the locality was not responsible for them.[101]

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99. Independent Offices Appropriations Acts of 1952 (65 Stat. 268, 277), and 1953 (66 Stat. 393, 403):

> . . . *Provided further*, That the Public Housing Administration shall not, after the date of approval of this Act, authorize the construction of any projects initiated before or after March 1, 1949, in any locality in which such projects have been or may hereafter be rejected by the governing body of the locality or by public vote, unless such projects have been subsequently approved by the same procedure through which such rejection was expressed.

100. In the Los Angeles situation, mentioned in note 98 *supra*, this is exactly what occurred. 99 Cong. Rec. 3586 (House, April 22, 1953); 99 Cong. Rec. 3504 (House, April 21, 1953); *see* 99 Cong. Rec. 3587 (House, April 22, 1953).

101. First Independent Offices Appropriation Act of 1954 (67 Stat. 298, 306):

In each enactment, Congress was thus attempting only to reach a satisfactory fiscal resolution of the intractable situations in which federal housing projects, once begun, were halted by referenda or otherwise. Congress did "not approve, much less prescribe" the referendum procedure. *Shapiro v. Thompson*, 394 U.S. 618, 639 (1969). The Housing Act remained unchanged, and required local approval only by the governing body. 42 U.S.C. § 1415(7)(a), (b).[102] Appellant Shaffer correctly admits that the provisos "are not now part of the Congressional enactment" (Brief for Appellant Shaffer, p. 53).[103]

> *Provided further*, That unless the governing body of the locality agrees to its completion, no housing shall be authorized by the Public Housing Administration, or, if under construction continue to be constructed, in any community where the people of that community, by their duly elected representatives, or by referendum, have indicated they do not want it, and such community shall negotiate with the Federal Government for the completion of such housing, or its abandonment, in whole or in part, and shall agree to repay to the Government the moneys expended prior to the vote or other formal action whereby the community rejected such housing project for any such projects not to be completed plus such amount as may be required to pay all costs and liquidate all obligations lawfully incurred by the local housing authority prior to such rejection in connection with any project not to be completed....

102. *Cf.* the history of the Gwinn Amendment, 41 OP. ATT'Y GEN. 274 (1956).

103. Appellant is correct because the Phillips Amendment, which superseded and repealed the previous provisos, was not permanent legislation, and was not repeated after fiscal 1954. *See* former 42 U.S.C. § 1411a. This is clear from the legislative history, 99 Cong. Rec. 3586 (House, April 22, 1953), where it was explicitly stated to be "applicable for fiscal 1954," *see National Labor Relations Board v. Thompson Products*, 141 F.2d 794, 797 (9th Cir. 1944), and from the nonpermanency of its language. *See Minis v. United States*, 15 Pet. 423, 445-46 (1841); *Cella v. United States*, 208 F.2d 783 (7th Cir. 1953).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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(Appendix Follows)

Appendix

The Housing Act of 1937, as amended.

42 U.S.C. § 1401

Section 1401. *Declaration of policy.*—It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in urban, rural nonfarm and Indian areas, that are injurious to the health, safety, and morals of the citizens of the Nation. In the development of low-rent housing it shall be the policy of the United States to make adequate provision for larger families and for families consisting of elderly persons. It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of the Authority), with due consideration to accomplishing the objectives of this Act while effecting economies. (Sept. 1, 1937, c. 896, § 1, 50 Stat. 888; July 15, 1949, c. 338, Title III, § 307(a), 63 Stat. 429; Sept. 23, 1959, P. L. 86-372, Title V, § 501, 73 Stat. 679.)

42 U.S.C. § 1410

(h) *Exemption of projects from taxes*—Payments in lieu of taxes—*Contributions by local governments.*—Every contract made pursuant to this Act for annual contributions for any low-rent housing project initiated after March 1949, shall provide that no annual contributions by the Authority [Public Housing Administration] shall be made

available for such project unless such project (exclusive of any portion thereof which is not assisted by annual contributions under this Act) is exempt from all real and personal property taxes levied or imposed by the State, city, county, or other political subdivisions, but such contract shall require the public housing agency to make payments in lieu of taxes equal to 10 per centum of the annual shelter rents charged in such project or such lesser amount as (i) is prescribed by State law, or (ii) is agreed to by the local governing body in its agreement for local cooperation with the public housing agency required under subsection 15(7)(b)(i) of this Act [§ 1415(7)(b)(i) of this title], or (iii) is due to failure of a local public body or bodies other than the public housing agency to perform any obligation under such agreement: Provided, That, with respect to any such project which is not exempt from all real and personal property taxes levied or imposed by the State, city county, or other political subdivisions, such contract shall provide, in lieu of the requirement for tax exemption and payments in lieu of taxes, that no annual contributions by the Authority [Public Housing Administration] shall be made available for such project unless and until the State, city, county, or other political subdivisions in which such project is situated shall constitute, in the form of cash or tax remission, the amount by which the taxes paid with respect to the project exceed 10 per centum of the annual shelter rents charged in such project: Provided further, That, prior to execution of the contract for annual contributions the public housing agency shall, in the case of a tax-exempt project, notify the governing body of the locality of its estimate of the annual amount of such payments in lieu of taxes and of the amount of taxes which would be levied if the

property were privately owned, or, in the case where the project is taxed, its estimate of the annual amount of the local cash contribution, and shall thereafter include the actual amounts of such payments or contributions in its annual report. Contracts for annual contributions entered into prior to the effective date of the Housing Act of 1964 [Sept. 2, 1964] may be amended in accordance with the first sentence of this subsection.

42 U.S.C. § 1415(7)(a)(i)(ii)
(7)(b)(i)

(7) In recognition that there should be local determination of the need for low-rent housing to meet needs not being adequately met by private enterprise—

(a) The Authority [Public Housing Administration] shall not make any contract with a public housing agency for preliminary loans (all of which shall be repaid out of any moneys which become available to such agency for the development of the projects involved) for surveys and planning in respect to any low-rent housing projects initiated after March 1, 1949, (i) unless the governing body of the locality involved has by resolution approved the application of the public housing agency for such preliminary loan; and (ii) unless the public housing agency has demonstrated to the satisfaction of the Authority [Public Housing Administration] that there is a need for such low-rent housing which is not being met by private enterprise; and

(b) the Authority [Public Housing Administration] shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this Act with respect to any low-rent housing project initiated after March 1, 1949, (i) unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required

by the Authority [Public Housing Administration] pursuant to this Act....

California Housing Authorities Law

Cal. Health and Safety Code § 34200. *Title of chapter.* This chapter may be cited as the Housing Authorities Law. (Added Stats. 1951, c. 710, p. 1947, § 1.)

Cal. Health & Safety Code § 34201. *Legislative findings and declaration of policy.* It is hereby declared:

(a) That there exist in the State insanitary or unsafe dwelling accommodations and that persons of low income are forced to reside in such accommodations; that within the State there is a shortage of safe or sanitary dwelling accommodations available at rents which persons of low income can afford and that such persons are forced to occupy overcrowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals, and welfare of the residents of the State and impair economic values; that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection, and other public services and facilities.

(b) That these slum areas cannot be cleared, nor can the shortage of safe and sanitary dwellings for persons of low income be relieved, through the operation of private enterprise, and that the construction of housing projects for persons of low income would therefore not be competitive with private enterprise.

(c) That the clearance, replanning, and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling

accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of state concern; that it is in the public interest that work on such projects be commenced as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the public interest for the provisions of this chapter is declared as a matter of legislative determination. (Added Stats. 1951, c. 710, p. 1947, § 1.)

Cal. Health and Safety Code § 34240. *Housing authority of county or city; transaction of business; resolution of governing body.* In each county and city there is a public body corporate and politic known as the housing authority of the county or city. The authority shall not transact any business or exercise its powers, unless, by resolution, the governing body of the county or city declares that there is need for an authority to function in it. (Added Stats. 1951, c. 710, p. 1950, § 1.)

Cal. Health and Safety Code § 34313. *Consultation with school district; approval of governing body of county or city.* Except where there existed on September 15, 1945, contracts for financial assistance between a housing authority and the Federal Government, no low-rent housing or slum-clearance project shall be developed, constructed, or owned by an authority after September 15, 1945, except after consultation with the school district in which the project is located, and until the governing body of the county or city in which it is proposed to develop, construct, or own the project, approves it by resolution. (Added Stats. 1951, c. 710, p. 1953, § 1.)

Cal. Health and Safety Code § 34353. *Liability on bonds; debt limitation.* Neither the commissioners of an authority nor any person executing the bonds are liable personally on

the bonds by reason of their issuance. The bonds and other obligations of an authority are not a debt of the city, county, State, or any of its political subdivisions and neither are they liable on the bonds, nor are the bonds or obligations payable out of any funds or properties other than those of the authority; and the bonds shall so state on their face. The bonds do not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation. (Added Stats. 1951, c. 710, p. 1957, § 1.)